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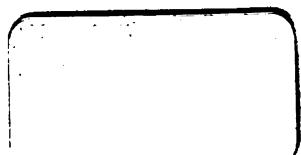
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CASES
ARGUED AND DETERMINED
IN THE
CIRCUIT COURTS
OF THE
UNITED STATES
FOR THE
EIGHTH JUDICIAL CIRCUIT.

REPORTED BY
GEO. W. M'CRARY,
THE CIRCUIT JUDGE

VOLUME V.

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JUDGES
OF THE
CIRCUIT COURTS OF THE UNITED STATES
FOR THE
EIGHTH JUDICIAL CIRCUIT.

HON. SAMUEL F. MILLER, Circuit Justice.
HON. GEORGE W. MCCRARY, Circuit Judge.

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HON. ISAAC C. PARKER, Western District of Arkansas.
HON. MOSES HALLETT, District of Colorado.



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REPORTS OF CASES ARGUED AND DETERMINED
IN THE
Circuit Courts of the United States
FOR THE
EIGHTH JUDICIAL CIRCUIT.

FERRY v. BURNELL and others.

(*District of Kansas. January, 1883.*)

1. **MORTGAGE — PRIORITY OVER UNRECORDED DEED.**—A recorded mortgage of the widow's interest in real estate of which the husband died seized takes precedence of a prior unrecorded deed made by the husband and wife in his life-time, and of which the mortgagee had no notice.
2. **ESTATES OF DECEASED — WIDOW'S PORTION OF REAL ESTATE.**—One-half in value of said real estate, secured to the widow by the statutes of Kansas, is equivalent to an undivided one-half before partition made.
3. **SAME — AUTHORITY OF WIDOW TO MORTGAGE.**—The widow may mortgage or convey her interest in said real estate, as an undivided one-half, before it is set apart to her by the probate court.

FOSTER, *District Judge.*—The question involved in this case, which comes up on the complainant's demurrer to defendant Ingham's cross-bill, is one of superior title to a part of the land included in complainant's mortgage. In July, A. D. 1877, Henry R. Dunham and Fidella Dunham, his wife (now Fidella Burnell, one of the defendants in this cause), conveyed to Thomas J. Ingham the W. $\frac{1}{2}$ of the N. W. $\frac{1}{2}$, and lot one in section 17, township 9 S., of range 4 E., in Clay county, by deed of general warranty. This deed

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was not recorded until December 31, 1878. In the meantime Henry Dunham died in September, 1877, leaving his widow Fidella, and two minor children, surviving. In February, 1878, and before the widow's interest in the estate had been set apart, she executed the mortgage in suit herein, and, among other real estate, included in said mortgage an undivided half interest in the real estate before sold to Ingham, which mortgage was filed for record April 6, 1878, being long before the Ingham deed was filed for record, and of the existence of which deed the mortgagee had no notice. The question is as to priority or better title to the wife's interest in the land in controversy. The statute of Kansas (chapter 33, § 8) provides as follows:

“One-half in value of all the real estate in which the husband, at any time during the marriage, had a legal or equitable interest, which has not been sold on execution or other judicial sale, and not necessary for the payment of debts, and of which the wife has made no conveyance, shall, under the direction of the probate court, be set apart by the executor as her property in fee-simple, upon the death of the husband, if she survives him.”

The recording act (chapter 22, § 21) reads as follows:

“No such instrument in writing shall be valid except between the parties thereto, and such as have actual notice thereof, until the same shall be deposited with the register of deeds for record.”

This section is more comprehensive and sweeping than the recording act of 1862. That provided that the instrument should not be of any validity against *subsequent purchasers for a valuable consideration* without notice, etc. The present statute makes the deposit of the instrument with the register of deeds essential to its validity as against parties not having actual notice of its existence. *To all parties not having such notice*, it is invalid and of no effect. There seems to be no way of escaping the conclusion that, so far as this mortgagee is concerned, and as to any rights he may have acquired

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under the mortgage, the conveyance to Ingham, of which he had no notice, cannot intervene. As to him it had no validity. It is urged by counsel for Ingham that, under the statute of descents and distribution before cited, there was nothing to descend or to set apart to the widow in this land; as she had conveyed all her interest away before her husband's death. As a matter of fact, that is true; so it would have been equally true that Dunham and wife, after the deed to Ingham, had no interest in the land to convey, and yet if they had afterwards made a conveyance of the land to a *bona fide* purchaser having no notice of the Ingham deed, the transfer would have been held good. The law conclusively presumes title in such cases to be in the grantor, where the rights of innocent parties are concerned.

There have been several adjudicated cases as to the relative rights of an innocent purchaser of real estate from an heir or devisee and one holding an unrecorded deed made by the ancestor in his life-time; and it has been decided in Kentucky and Connecticut (4 Mon. 120; 6 B. Mon. 531; 24 Conn. 211) that the unrecorded deed of the ancestor took precedence of a recorded deed from the heir or devisee of the grantor. They put it upon the ground that the statute only makes void unrecorded conveyances as to subsequent purchasers from the same grantor, and not from his heirs or devisees. That reason would lose much of its force in this case, for this mortgagee holds whatever right he has under one of the grantors in the Ingham deed, and not from an heir or devisee; and, besides, the Kansas recording act does not make the instrument invalid alone as to subsequent purchasers, but to all parties not having actual notice. The cases referred to, however, are overborne by the weight of authority and sound reason. In *Kennedy v. Northrup*, 15 Ill. 155, this question is fully discussed by Judge Caton, delivering the opinion of the court, and citing *McCulloch v. Endaly*, 3 Yerger, 346, and *Powers v. McFurreen*, 2 Serg. & R. 44. In the Illinois case the court say: "In case of his

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[the ancestor's] death, the heir becomes the apparent owner of the legal title, and it is equally important and equally just that the public may be allowed to deal with him as with the original grantor if living." The rule established in the Illinois case has been followed in Missouri. *Youngblood v. Vastine*, 46 Mo. 241. If this is true of an heir or devisee who is in no manner a grantor in the unrecorded deed, and whose signature is not required to divest the grantor's title, *a fortiori* it must be true of the wife, who must have joined in the deed to convey a perfect title, and who could not be deprived of her interest in the land without her consent, except when sold on judicial sale. The statute of Kansas, on the death of the husband, vests the title of one-half in value of all the real estate of which he was seized at his death in the wife, subject, however, to debts existing against the estate. This is a provision for the wife in lieu of dower, and it becomes a vested right on the death of the husband.

The statute says *one-half in value* shall be set apart. What is the widow's interest before it is set apart? I should say it is an undivided one-half. The words "in value" are used in the statute to negative the idea that it might be one-half in area that is to be set off to the widow. From all that appeared on the record at the time this mortgage was made Mrs. Dunham was the owner in fee of the undivided half of this real estate, subject to the payment of any debts of the husband not liquidated by the personal estate, and which interest remained to be set apart to her under the direction of the probate court. On this apparent state of facts the mortgagee had the right to act, and I know of no reason why the widow may not convey all her title and interest in the land without waiting until it is divided or set apart to her.

The demurrer to cross-bill must be sustained.

Rossington, Johnson & Smith, for complainant.

Leland J. Webb, for defendant Ingham.

DISTRICT OF NEBRASKA.

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Nickerson, Trustee, v. Meacham and others.

NICKERSON, Trustee, v. MEACHAM and others.

(District of Nebraska. January, 1883.)

1. **EQUITY — BONA FIDE PURCHASER — CONSTRUCTIVE NOTICE — CONVEYANCE OF MORTGAGED PREMISES.** — The holder of a mortgage surrendered the same upon the receipt of a quitclaim deed of the land from the mortgagor. The mortgagor, without knowledge of the mortgagee, had previously deeded the same land to his daughter, who, prior to the surrender of the mortgage by the mortgagee, and the conveyance of the mortgaged land by her father to the mortgagee, deeded the same to a third party, in consideration of certain promissory notes of doubtful value. *Held*, that if the conveyance of the daughter to the third party was without consideration, it should be set aside, and that the mortgage, which had been canceled in ignorance of the fact that the mortgagor had parted with the title, should be enforced against the land. It was the duty of the holder of the mortgage to examine the record for conveyances by the mortgagor before taking a quitclaim deed, and as against a *bona fide* purchaser for value he would be without remedy; but if the party claiming to be a *bona fide* purchaser for value is proven not to be such, he has no equities, and there is nothing to prevent a court of equity from disposing of this case upon the equities as they exist between the mortgagor and mortgagee.
2. **SAME — BONA FIDE PURCHASER — PAYMENT BEFORE NOTICE OF EQUITIES — PROOF.** — A party relying upon the defense that he is a *bona fide* purchaser, entitled to hold notwithstanding a prior equity, must establish his defense by proof. It is an affirmative defense. The statement of a consideration in the deed is not sufficient, but actual payment before notice must be shown.
3. **SAME — PRESUMPTION AS TO VALUE OF PROMISSORY NOTES.** — As a general rule, the law will presume that a promissory note, even if past due, is worth its face in money; but this is only a presumption which arises in the absence of direct proof as to value, and may be overcome by comparatively slight proof in contradiction, especially when the paper is old, dishonored, or outlawed.

In equity. On exceptions to master's report.

The principal matter in controversy in this case is as to the validity of a conveyance of certain lands from respondent Mary Meacham to respondent H. H. Blodgett, of date February 7, 1880. The title to the land was, prior to Feb-

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ruary 8, 1877, in respondents Stephen A. Meacham and Nancy, his wife, who on that day executed a mortgage thereon to A. Otis Evans, to secure the payment of \$2,700, with interest and attorney's fees. The purpose of this suit is to foreclose said mortgage; and in order to make the foreclosure effectual, complainant prays the cancellation of the conveyance above referred to, and that the satisfaction of said mortgage hereinafter mentioned may be set aside.

On the twenty-fifth day of September, 1877, said Stephen A. Meacham, then the owner of said land, his wife not joining, conveyed the premises to his daughter, the respondent Mary Meacham, excepting from the covenant of warranty the mortgage above named. On the twelfth of October, 1878, the said A. Otis Evans, through his agent, having no knowledge of the conveyance from Stephen A. Meacham to Mary Meacham, took from the said Stephen A. and Nancy, his wife, a quitclaim deed in the name of B. L. Harding for the land in question, and as the sole consideration therefor delivered up as satisfied the aforesaid notes and mortgage for \$2,700.

On the seventh of February, 1880, the respondent H. H. Blodgett received a conveyance of the land in controversy from said Mary Meacham, the consideration in the deed being expressed as \$1,200. This last transaction, which is the subject of the present controversy, was in this wise: Blodgett gave to said Mary Meacham promissory notes against various parties, amounting to \$1,200, as the consideration for the whole of the land, and immediately agreed with her to reconvey to her one half of the land, in consideration that she should allow him to take back one-half of the notes to be selected by him. Accordingly, after receiving the conveyance, Blodgett reconveyed to Mary Meacham the undivided half of the land, and selected and took back one-half of the notes. It is charged that this transaction between Blodgett and Mary Meacham was fraudulent, and also that it was without consideration, the notes left in her hands

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after returning the selected one-half to him, having been, as is alleged, entirely worthless.

The case has been twice before the master. In his first report he found as a fact that the notes given by Blodgett to Mary Meacham as a consideration for said land were old notes, uncollectible and worthless, and nearly all, if not quite all, past due; and that not a dollar has ever been collected thereon. The case was recommitted to the master to further investigate the question of the value of said notes, with leave to parties to produce further proof. After taking a large amount of additional evidence the master has filed a second report, in which he finds as facts: (1) that the consideration for the conveyance in controversy was grossly inadequate; (2) that he cannot find that any of the notes have been collected or paid.

When the case came up for hearing upon exceptions to this latter report, after the oral argument, the court directed counsel to file briefs upon the whole case, but to give special attention to the question what, under the circumstances of this case, is the presumption as to the value of the notes turned over by Blodgett to Mary Meacham in consideration for the conveyance, in the absence of any direct proof upon the subject? Elaborate briefs have accordingly been filed.

J. L. Webster, for complainant.

Walter J. Lamb, G. M. Lamberton, J. E. Philpot, J. C. Crooker, and *H. H. Blodgett, pro se*, for respondents.

McCrary, Circuit Judge.—If the conveyance from Mary Meacham to H. H. Blodgett was without consideration, it should be declared void and set aside, and the mortgage for \$2,700 should be enforced against the land, since it was undoubtedly canceled in ignorance of the fact that the mortgagor had parted with the legal title and was no longer able to make a valid conveyance. It is true, as respondents'

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counsel have said, that it was the duty of the holder of the mortgage to examine the record for conveyances by the mortgagor before taking a quitclaim deed from him and canceling the mortgage; and it follows that, as against a *bona fide* purchaser of the land for value after the cancellation of the mortgage, he is without remedy. But if Blodgett is not such a purchaser he has no equities, and there is nothing to hinder a court of equity from disposing of the case upon the equities as they exist between mortgagor and mortgagee. As between them, complainant is entitled to relief, as the cancellation of the mortgage was the result of a mistake on the part of the mortgagee, and of a palpable fraud on the part of the mortgagor, who of course knew that he had conveyed the land to his daughter, and that he had no power to convey it a second time. Our inquiry must therefore be confined to the question, was Blodgett a *bona fide* purchaser for value? The proof leaves this question in doubt. All that clearly appears is that Blodgett turned over to Mary Meacham a number of promissory notes, all of which were past due, and some of which were certainly worthless. Whether any of the notes turned over by him were of any value, is a question which cannot be clearly settled upon the evidence in the case; and it must, therefore, depend upon the question whether the law raises a presumption, in the absence of proof, that the notes were of value. The respondent Blodgett rests his defense upon the claim that he is a *bona fide* purchaser of the land in question without notice of the prior equities existing in favor of the holder of the mortgage. A party relying on the defense that he is a *bona fide* purchaser, entitled to hold notwithstanding a prior equity, must establish his defense by proof. It is an affirmative defense. The statement of a consideration in the deed is not sufficient, but actual payment before notice must be shown. The facts giving the right of protection must be alleged and proved. Abb. Tr. Ev. p. 715, § 33, and cases cited. The same rule is laid down in the case of *Boon v. Chiles*, 10 Pet. 177.

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The burden being upon the respondent Blodgett to make out his defense by showing affirmatively that he is a *bona fide* purchaser for value, he claims to have discharged it by showing that he turned over the notes in question in payment for the land, and without showing affirmatively that the notes were of value. As a general rule, the law will presume that a promissory note, even if past due, is worth its face in money; but this is only a presumption which arises in the absence of direct proof to establish the value of the paper, or of circumstances sufficient in themselves to rebut the presumption. Indeed, this presumption is much stronger where the paper is not yet due than it is where it is overdue and dishonored; but it prevails in either case.

The question here is whether the circumstances are such as to rebut this presumption, and to throw upon respondent Blodgett the burden of showing that the notes were of value, or, in other words, that he paid value for the land.

There are several circumstances tending very strongly to throw suspicion upon the entire transaction, and, when they are all considered together, they are of such a character as ought, in my judgment, to overcome the presumption that the notes, or any of them, were of value. These circumstances may briefly be stated as follows:

1. The purchase was made by Blodgett without any investigation as to the title to the land. It is fair to presume that if he had been paying what he regarded as a fair price, and purchasing in good faith, he would have looked into the record to ascertain the condition of the title.

2. Equally suspicious is the fact that Mary Meacham accepted the notes, all past due and some barred by the statute of limitations, without inquiry as to the solvency of their makers, and without investigation of the question whether they were good or not. It must be considered very remarkable, indeed, that a person of mature years and ordinary intelligence would, in good faith, sell and transfer a large body of valuable land for such a consideration, and

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without knowing or inquiring whether she was receiving anything of value or not.

3. Still more remarkable and suspicious is the circumstance that the parties agreed that after the delivery of all the notes by Blodgett to Mary Meacham, and after a conveyance from the latter to the former of all the land, and as a part of the same transaction, Blodgett should reconvey to Mary Meacham one-half of the land, and should select and take back from her one-half of the notes. It is impossible to understand why all this was done, if it was not for the very purpose of giving him the opportunity to take back all the notes that were of any substantial value, and leave in her hand only those that were practically worthless.

4. The court cannot overlook the fact, which appears in the testimony of Blodgett, that he is unable to give the name of a single one of the makers of the notes who is or has been, since the transaction in question, solvent in the sense of having property subject to execution. When the case was referred to the master, the court supposed that a list of the notes transferred could be readily obtained; that the names and places of residence of their makers could be furnished, either by Blodgett or Mary Meacham; and that thereby the complainant would be furnished with information upon which to prosecute an investigation as to the value of the notes. But it seems that after a long investigation, and the taking of testimony covering hundreds of pages, there is even yet some doubt as to who the makers of the notes were, and as to where they are to be found. Add to this the fact that no effort whatever has been made to collect any of the notes, and that not a dollar has been paid upon any one of them during a period of now nearly three years, and it must be admitted that all the circumstances, taken together, are such as to cast great doubt upon the question of the *bona fides* of the transaction, and of the value of these securities.

At the hearing on exceptions to the master's second re-

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port, the court was of the opinion that the case must turn upon the question whether these facts and circumstances were sufficient to overcome the presumption that the promissory notes were worth their face in money. That such is the general presumption, in the absence of suspicious circumstances and in the absence of proof, seems to be admitted; but it is a presumption which may be overcome by comparatively slight proof, especially in a case where the paper is old, dishonored and some of it barred by limitation. The law raises the presumption of value only in cases where there is no evidence upon which to found a contrary presumption. If the facts are such as to create a strong doubt of the integrity of the transaction and as to the value of the paper, the burden of showing that the paper was of value will be thrown upon the party asserting that fact. This rule is especially applicable to the present case, where the facts are, or ought to be, known to the respondent Blodgett, and where the complainant, after diligent effort, seems to have been unable to ascertain them.

It is certainly not too much to say upon this record, and the evidence before the court, that the evidence on the part of Blodgett in respect to the payment of the consideration stated in the deed is unsatisfactory, and that such proof was vital in order to uphold the deed, surrounded as it is in other respects with suspicion. This being so, it must be held that the burden of showing that the paper was of value, and that Blodgett was a *bona fide* purchaser, rests upon him. Such, in substance, is the doctrine announced by the supreme court of the United States in two cases at least. *Clements v. Moore*, 6 Wall. 299; *Clifton v. Sheldon*, 23 How. 481.

The result is that there must be decree for complainant in accordance with the prayer of his bill, and it is so ordered.

State National Bank of Lincoln, Nebraska, v. Young and others.

STATE NATIONAL BANK OF LINCOLN, NEBRASKA, v. YOUNG and others.

(District of Nebraska. 1883.)

1. LETTER OF CREDIT — WHAT IS NOT. — A letter such as the one following, written by the defendants to the plaintiff, does not constitute a letter of credit:

“CHICAGO, 7-23-1880.

“*State National Bank, Lincoln, Nebraska:*

“GENTLEMEN — Mr. Dawson, of Dawson & Young, has been to see us, and has explained their business to our satisfaction, and we wish them to continue with us, and we expect to take care of them and pay drafts as heretofore.

“Respectfully,

WILLIAM YOUNG & Co.”

2. CONTRACT — AGREEMENT TO ACCEPT DRAFT. — Nor does the same amount to an agreement to accept any drafts which Dawson & Young, or either of them, might draw on William Young & Co., the defendants. To constitute a valid and binding promise to accept the draft of another, the draft must be described in terms not to be mistaken.
3. SAME — DEPARTURE FROM TERMS. — Any departure from the terms of an agreement to accept the bill or draft of another will not bind the party sought to be charged as acceptor.

Demurrer to petition.

DUNDY, *District Judge*. — It is stated in the petition that Dawson & Young were largely dealing in and shipping live-stock to Chicago; that generally they consigned the same to William Young & Co., the defendants, at Chicago, who were then doing business as commission merchants; that Dawson & Young were in the habit of drawing their drafts on Young & Co. for the stock shipped, and that the same were cashed by the plaintiff at the request of Dawson & Young, and that the same, with one exception, were paid by the defendants; the payment of one was refused, and that the same was afterwards paid by Dawson; that subsequently Dawson went to Chicago and saw the defendants and arranged with them for future acceptances, and, pur-

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suant to the arrangement then made, the defendants wrote to the plaintiff a letter, of which the following is copy:

"CHICAGO, 7-23-1880.

"State National Bank, Lincoln, Nebraska:

"GENTLEMEN — Mr. Dawson, of Dawson & Young, has been to see us, and has explained their business to our satisfaction, and we wish them to continue with us, and we expect to take care of them and pay drafts as heretofore.

"Respectfully, WILLIAM YOUNG & Co."

That the said letter was placed in the hands of the officers of the banks; that after the letter had been so received by the plaintiff, Dawson, on the thirty-first of July, 1880, drew two drafts on the defendants, each for the sum of \$2,000, and on the third of August Dawson drew another draft for the sum of \$1,000, all of which were payable at sight; that the said drafts were cashed by the plaintiff, and that the same went to protest and were never accepted or paid by the defendants.

To this the defendants interpose a general demurrer.

If the letter in question cannot be regarded as an agreement to accept the bills or drafts thereafter to be drawn by Dawson & Young, nor as a letter of credit, then there is no good cause of action stated in the petition. It lacks the usual formalities, and the indispensable requisites of an ordinary letter of credit, so that it is altogether unnecessary to consider it in that connection. The plaintiff treats the letter as an agreement to accept the bills to be drawn by Dawson & Young, and as such we will consider it, because there is nothing stated in the petition, independent of the letter, that would in any way tend to fix any liability on the defendants.

Questions of this sort were quite frequently discussed in the several courts of this Union down to the year 1817, when a decision of the first importance and by the highest authority was finally made.

The English cases bearing upon the subject in hand were

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fully considered by the court, and, though perhaps not uniform, the principle settled thereby was adopted by our own court, to which it has ever since adhered. The rule deduced from those cases, and which was stated and applied in the first of the leading cases decided in this country, is:

“That a letter written within a reasonable time before or after the date of a bill of exchange, describing it in terms not to be mistaken, and promising to accept it, is, if shown to the person who afterwards takes the bill on the credit of the letter, a virtual acceptance binding the person who makes the promise.” *Coolidge v. Payson*, 2 Wheat. 66.

The rule here enunciated has been repeatedly recognized and followed by the supreme court, and its soundness is now believed to be unquestioned. *Schimmelpennich v. Bayard*, 1 Pet. 264; *Boyce v. Edwards*, 4 Pet. 111.

This being the rule, it follows that a letter, to bind the writer in such cases, *must be written within a reasonable time before or after the date of the bill to be accepted*. The letter *must describe the bill in terms not to be mistaken*. The letter *must contain a promise to accept such a bill*. The letter *must be shown, or its contents made known to, the party for whom it was intended*. And the *party for whom the letter was intended must have taken the bill or advanced his money on the CREDIT OF THE LETTER, and not otherwise*. We must apply this rule to the letter described in the plaintiff's petition, and determine the *character* and value and efficacy of the letter by that standard.

The letter bears date the twenty-third of July, 1880, and was placed in the hands of the officers of the plaintiff bank soon afterwards, and before the bank cashed any of the drafts. The drafts were drawn on the thirty-first of July and the third of August, respectively. That would seem to be *within a reasonable time* after the receipt of the letter by the bank, and it is not made to appear how any injury could result to the defendants by mere lapse of time between the date of the letter and the cashing of the drafts. But

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this is not where the real difficulty is to be found. It is stated that "Mr. Dawson, of Dawson & Young, has been to see us, and has explained their business to our satisfaction, and we wish them to continue with us." So far there is nothing about the letter of a dubious or uncertain character, or that could deceive or mislead any one. But it is further stated, "and we expect to take care of them and pay drafts as heretofore." Just how they were to be taken care of does not appear by the letter, nor by averment in the petition. The letter states that they expect to pay drafts as *heretofore*. But *how* did they treat them "heretofore?" As stated in the petition, by paying part, and by refusing to accept or pay the other part. If, then, the letter had contained an unequivocal *promise* to pay "drafts as heretofore," would a prudent man be likely to rely on such a promise, knowing at the time that a part only of such drafts had been paid, and that at least one theretofore had been repudiated by the drawee. Would he be likely to part with his money on the faith of such a letter? Ordinary prudence, it seems to me, would stop short of making advances under such circumstances. But the great trouble and inherent difficulty about this letter is, it contains no *agreement* or *promise* to pay or accept the drafts of Dawson & Young. It is simply stated: "We expect to . . . pay drafts as heretofore." That is not enough. There is no *promise* to pay *any* drafts "as heretofore." There is no draft or drafts described in "terms not to be mistaken." In the absence of such *description* and a promise to pay, no liability attaches. To say, "*We expect to pay drafts as heretofore*," is not equivalent to saying, "*We agree to pay drafts as heretofore*." To hold otherwise would be doing violence to language and principle alike. There may have been many and good reasons for expecting to pay the drafts, while in reality the apparent reasons were unreal and illusory. However this may be, I am of opinion that the defendants did not *promise* to accept or pay the drafts described in the petition, and that they in-

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curred no liability by writing the said letter; and that they reserved to themselves the right to refuse payment or acceptance of all the drafts described in plaintiff's petition.

There is another point which might be fatal to the plaintiff's right to recover, even if we could regard the letter as an absolute promise to pay the drafts of Dawson & Young. The fair construction to be placed on the letter would lead us to conclude that the writer had in his mind the drafts of Dawson & Young, which they expected to "pay as heretofore." The drafts actually repudiated by the defendants were not drawn on them by Dawson & Young, but by Dawson alone. So if the letter had fully described the drafts to be drawn by Dawson & Young, and the defendants had promised to accept and pay them when so drawn, still I think even then they would be under no sort of legal obligation to accept and pay the drafts drawn by Dawson alone. It seems unnecessary to elaborate, as the correctness of this proposition, it is submitted, cannot be controverted.

The demurrer is sustained.

Mason & Whedon, for plaintiff.

Bisbee, Ahrens & Hawley and *Field & Holmes*, for defendants.

GOODNOW v. GRAYSON, Adm'r, etc.

(Northern District of Iowa, Central Division. January, 1893.)

1. REMOVAL OF CAUSE — PREJUDICE AND LOCAL INFLUENCE ACT.— Under the prejudice and local influence act a party, to have the right of removal, must be a non-resident when the petition for removal is filed. So, where a party, having a right to remove a suit into the federal court from a state court, fails to exercise that right, and subsequently removes into and becomes a citizen of the state where suit is brought, the right of removal is defeated and terminated by the change of citizenship.
2. SAME — ADMINISTRATOR SUBSTITUTED AS PARTY.— Where a non-resident, having a right to the removal of suit into the federal court,

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fails to exercise that right, and removes into the state where suit is brought and becomes a citizen thereof and there dies, his executor or administrator substituted for him in the suit cannot remove it into the federal court.

Motion to remand cause to state court.

In August, 1876, this suit was brought in the circuit court of Webster county, Iowa, by the present complainant, then and now a citizen of New York, against Grace H. Litchfield, a citizen of New York and Webster county, Iowa, as co-defendant, to recover the amount of certain taxes paid by the Iowa Homestead Company, an Iowa corporation, upon realty situated in Iowa, the title to which had been in dispute between the homestead company and Mrs. Litchfield, but which was finally adjudged to be the property of the latter. The homestead company claimed that it was entitled to recover back the sums by it paid to discharge the taxes on the realty, as such payment inured to the benefit of Mrs. Litchfield, and it assigned this claim and all rights under it to E. R. Goodnow, who thereupon instituted this proceeding in equity, praying, among other things, that the amount advanced in payment of taxes should be declared an equitable lien on the realty. January 19, 1877, Grace H. Litchfield filed an answer to the merits of the bill, and on April 8, 1879, filed a petition for a removal of the cause to the United States court. No action was taken thereon in the state court, nor did Mrs. Litchfield file a transcript of the record in the federal court. June 29, 1880, Mrs. Litchfield filed an amendment to her answer in the state court, and December 14, 1880, procured an order requiring complainant to give security for costs in the state court. In October, 1881, Mrs. Litchfield died, and R. O. Grayson, a citizen of Iowa, was appointed her administrator, and on September 14, 1882, he was substituted as defendant in place of Mrs. Litchfield, and on October 2, 1882, he filed a petition for removal of the cause to this court, under clause 3 of section 639 of the Revised Statutes, averring therein that the as-

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signment of the cause of action by the homestead company to complainant was colorable only, and that the company remained the real party in interest. The state court refused to grant the order of removal, and Grayson procured a transcript of the record and filed the same in this court, whereupon complainant moved to remand the cause.

M. D. O'Connell and *Geo. Crane*, for complainant.

C. H. Gatch, for Grayson, administrator.

SHIRAS, *District Judge*.—The record shows that Grace H. Litchfield never invoked the action of the state court upon the petition for removal filed during her life-time. She simply filed it and then ignored its existence. She took no steps to bring a transcript of the record into the United States court. She appeared in the state court and asked and obtained leave to amend the pleadings, and also demanded security for costs in that court. In other words, up to the time of her death, which was over two years after the date of the filing of the petition for removal, she fully recognized the jurisdiction of the state court, without protest, and without invoking the action of the state court upon the petition for removal. The facts do not present a case wherein a party having properly asked a removal, which is refused by the state court, then under protest continues to defend his rights in the state tribunal.

If Mrs. Litchfield had invoked the action of the state court, and upon its refusal to transfer the cause she had then endeavored to protect her rights in the state court, she would not have forfeited her right of removal. She would then be within the protection of the rule recognized in *Railroad Co. v. Koontz*, 103 U. S. 5. Under the facts, however, of this case, it must be held that Mrs. Litchfield never perfected the removal of the cause, but, on the contrary, that she abandoned her petition for removal, and fully recog-

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nized and submitted to the jurisdiction of the state court. This is further evidenced by the fact that the administrator did not rely upon the petition for removal filed by Mrs. Litchfield, but after his appointment he filed a second and independent petition. Under these circumstances, it is clear that the cause has not been removed to this court by virtue of the petition filed during the life-time of Mrs. Litchfield.

2. Has this court obtained jurisdiction through the action of the administrator, who has filed a petition asking a removal under clause 3 of section 639 of the Revised Statutes? The theory upon which this petition proceeds is that the controversy, when the suit was commenced, was in fact between the Iowa Homestead Company, a corporation organized under the laws of Iowa, and Grace H. Litchfield, a citizen of New York, the transfer and assignment of the cause of action to E. K. Goodnow being colorable only; and that, as the real parties in interest were citizens of different states, the cause was removable under clause 3 of section 639 of the Revised Statutes, at any time before the final trial, and that the death of Mrs. Litchfield and the substitution of her administrator did not defeat the right of removal, even if the administrator is a citizen of Iowa.

As presented by counsel, the question for determination, therefore, resolves itself into the following:

If A., a citizen of Iowa, sues B., a citizen of New York, in a state court in Iowa, for an amount in excess of \$500, and B. joins issue therein, and the cause is continued over several terms, no application for a removal of the cause to the federal court having been made, and before trial B. dies, and thereupon C., a citizen of Iowa, is appointed administrator of B.'s estate, and is substituted as defendant in the cause, can C., as administrator, remove the cause into the federal court under clause 3 of section 639?

It is settled that under the act of 1789, when the right of removal is dependent upon the citizenship of the parties, such diverse citizenship must exist at the time the suit was com-

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menced. *Ins. Co. v. Pechner*, 95 U. S. 183. The same construction is applied when the removal is sought under the act of 1875. *Kaiser v. Ill. Cent. R. R.* 2 McCrary, 187.

It is further settled that when a party to a suit pending in the United States court dies, and his administrator or executor is substituted for the decedent, the suit does not abate, but the cause continues, and that the jurisdiction of the federal court, having attached during the life time of the decedent, is not terminated or affected by the substitution of an administrator or executor who is a citizen of the state whereof the other litigants are citizens. *Clark v. Mathewson*, 12 Pet. 164; *Morgan v. Morgan*, 2 Wheat. 230; *Clark v. Dunn*, 8 Pet. 1. When, however, suits are instituted by or against administrators or executors in the first instance, then jurisdiction and the right of removal is dependent upon the citizenship of the person acting as administrator or executor, and not upon the citizenship of the decedent, creditors, legatees or other beneficiaries. *Riel v. Houston*, 13 Wall. 66; *Amory v. Amory*, 95 U. S. 186. None of these authorities, however, exactly touch the question now before the court. Assuming that Grace H. Litchfield had the *right* of removal, she did not exercise it during her life-time. The jurisdiction of the United States court, therefore, did not attach to the case during her life-time. Did the right of removal possessed by her at the instant of her death pass to her administrator? If the right of removal existed when the suit was commenced, could such right be terminated by a change of residence on part of Mrs. Litchfield or on part of her administrator?

In the case of *Relfe v. Rundle*, 103 U. S. 222, a case was removed from the state court by a trustee of an insolvent insurance company, who was substituted in the cause as the representative of an insolvent and virtually extinct corporation, and it would seem as though the court placed the right of removal upon the citizenship of the trustee, who was substituted in the cause after its commencement; but it is not made clear beyond question that such was the view of the

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supreme court. If it be true that the supreme court did place the right of removal upon the fact that the trustee was a citizen of Missouri, then it would seem to follow that if he had been a citizen of Louisiana he could not have removed the cause, even though the corporation which he represented had been a citizen of Missouri, and hence could have removed the cause. This would, in principle, be decisive of the question now before the court, but the facts of that case show that the insolvent corporation was a citizen of Missouri, and in the opinion this fact is stated as though it might have weight upon the question, and hence it is not clear that the supreme court rested the right of removal upon the sole fact of the citizenship of the trustee.

On principle, the question, in my judgment, resolves itself into the proposition whether Mrs. Litchfield could, after the cause had been commenced, have removed to and become a citizen of Iowa, and still retained the right of removal under the local prejudice act. That act gave the right of removal to the party who was a non-resident of the state wherein the suit was pending, and seems to proceed upon the theory that, by reason of such non-residency, a prejudice or local influence may exist against the non-resident, which will prevent the non-resident from obtaining justice in the local court. If, then, a non-resident, after being sued in the state court, before trial removes to, and becomes a citizen of, the state wherein the litigation is pending, has not the fundamental reason, upon which removals are permitted under this act, ceased to exist, and does it not follow that the right of removal has ceased to exist? In my judgment the party asking a removal under the act of 1867 must be a non-resident when the petition for removal is filed; and hence, if Mrs. Litchfield during her life-time had removed to Iowa, such change of citizenship would have defeated or terminated the right of removal. If the jurisdiction of the United States court had attached, and then she had removed to Iowa, such

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change of citizenship would not have affected the jurisdiction that had already attached.

If, then, Mrs. Litchfield, by removing to Iowa, would have terminated the right of removal, should not the same result follow if the party who is substituted for her and succeeds to her rights is a citizen of Iowa? Viewing the question in the light of the position taken by counsel for the administrator,—*i. e.*, that the administrator succeeds to and stands exactly in the place of the decedent,—it still seems to me that when the *administrator* asks to remove the cause, the court must consider the question in the light of the facts as they now exist, and that in this view, as already stated, it must be held that the *party* to the suit had removed from New York to Iowa, and that it makes no difference whether such removal took place during the life-time of Mrs. Litchfield, or after her death, by substituting in her place a citizen of Iowa. The fact in either case would be the same, to wit, that the application for removal is made by one who is a citizen of Iowa, and being such, a removal cannot be had at his instance under the act of 1867, as the right under that act is restricted to non-residents. If, however, the question is to be determined by the citizenship of the parties to the record at the time the administrator became a party to the record, which position is sustained by our view of the ruling in *Relfs v. Rundle*, *supra*, and also by the case of *Burdick v. Peterson*, 2 McCrary, 135 [S. C. 6 Fed. Rep. 480], the same result follows, as the administrator was then a citizen of Iowa, and hence could not remove the cause under the act of 1867. Under either view, Grayson did not possess the right of removal under the act of 1867 at any time, and hence the cause could not be removed to this court under that act. The motion to remand must therefore be sustained.

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CREDIT COMPANY (Limited) OF LONDON, ENGLAND, v. ARKANSAS CENT. R. Co. and others.

(Eastern District of Arkansas. October, 1882.)

1. **RAILROADS — RECEIVER — CERTIFICATES OF INDEBTEDNESS — REPAIR OF ROAD.**—A court of equity may authorize the receiver of a railroad to issue certificates of indebtedness and make them a first lien upon the road, for the purpose of raising funds to make necessary repairs and improvements, but it is a power to be sparingly exercised; and when the road cannot be kept running without its exercise, except to a very limited extent, the sound practice is to discharge the receiver or stop running the road and speed the foreclosure.
2. **SAME — DUTY TO BUILD ROAD.**—It is not a judicial duty to build railroads, and the assent of all the parties interested in the property cannot make it one, and there is no difference in principle between a court building a railroad by the issue of receiver's certificates, and making extensive and general repairs and betterments, approximating the original cost of construction by like means.
3. **RAILWAY MORTGAGE — BENEFICIARIES BOUND.**—In the absence of fraud the beneficiaries in railway mortgages are bound by what is done by their trustee.
4. **RAILROAD BONDS — FORECLOSURE.**—Where a holder of railroad bonds alleged the trustee had filed a bill and obtained a decree of foreclosure for the principal of the bonds not due, as well as for the interest which was due, without the written request of the holders of one-third in amount of the bonds, which it was claimed was a necessary prerequisite by the terms of the mortgage to the exercise of the power to declare the principal debt due, and sought for this reason to avoid the foreclosure proceedings, *held*, (1) that it was competent for the trustee to file a bill to foreclose for the interest due; (2) that the plaintiff ratified the action of its trustee by filing and proving in the master's office, in the foreclosure proceedings, more than one-third in amount of all the bonds issued; and (3) that the absence of such a requisition did not affect the jurisdiction of the court, and a decree for a larger sum than was due was error merely, to be corrected on appeal, and that as the error was one of which the trustee could not complain, and there was no fraud, the bondholders were as much bound as the trustee, and could not avoid the decree, on this ground, in any form of proceeding.
5. **SAME. — EFFECT OF LACHES.**—The effect of laches is not avoided by a general averment that the plaintiff was ignorant of the facts until a short time before the bill was filed. A general allegation of igno-

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rance at one time, and knowledge at another, is of no effect. If the plaintiff made any particular discovery, it should be stated when it was made, what it was, how it was made, and why it was not made sooner.

6. **SAME — FORECLOSURE — SALE UNDER.**— When the property of a railroad company is sold under a decree of foreclosure, at which all persons are authorized to bid, the fact that it is purchased by the president of the company in his individual right will not in itself raise a trust relation between him and a holder of the bonds of the company which will entitle the latter to treat him as a trustee of the property so purchased.
7. **SAME — PURCHASER AS TRUSTEE.**— One claiming the right to avoid a purchase made by another at a judicial sale, or of treating the purchaser as a trustee, and availing himself of the purchaser's bid, cannot delay the assertion of this right to enable him to decide in the light of subsequent events whether he would or not be profited by its assertion.
8. **PLEADING — LACHES NEED NOT BE PLEADED.**— Laches need not be pleaded. If the cause as it appears on the hearing is liable to the objection, the court will refuse relief without inquiring whether there is a demurrer, plea or answer setting it up.

In equity.

CALDWELL, *District Judge.*—The Arkansas Central Railroad Company was formed for the purpose of constructing a railroad from Helena to Little Rock, with a branch to Pine Bluff. The chief ultimate promoters of this enterprise were Stephen W. Dorsey and J. E. Gregg. Dorsey was the president of the company, and its financial agent and manager, and generally controlled and conducted all the affairs of the corporation.

What is commonly called an exhaustive contract was entered into between the company and J. E. Gregg & Co. for the construction of the road, by the terms of which Gregg & Co. were to build the road for all its stock subscriptions and other assets, and a majority of its stock.

The directors of the railroad company and all its officers, except the president, seem never to have had more than a mere nominal existence after the making of this contract.

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From that time Gregg & Co. were regarded as owners of the road, and its assets in hand, as well as all that might thereafter be acquired.

Dorsey was a member of this firm also, and in the double capacity of president of the railroad company and a member of the firm of Gregg & Co. he seems to have managed the financial affairs of both.

The company executed a mortgage to secure its first mortgage bonds, which were put upon the market and sold to the amount of \$720,000. The defendant, the Union Trust Company of New York, was the trustee in this mortgage. Dorsey went abroad to effect a sale of the bonds, and succeeded in placing most of them in London and Amsterdam.

By the fall of 1872, forty-eight miles of the road, which was a narrow gauge, had been completed in an imperfect manner. The work of construction was never resumed after that date. About this time Dorsey engaged actively in politics, and having been elected to the United States senate in the early part of 1873, and the assets and resources of the railroad company having been exhausted, he and the firm of J. E. Gregg & Co. soon ceased to take any further interest in the enterprise; and the defendant Johnson, who had at the solicitation of Dorsey invested some money in the concern of J. E. Gregg & Co., was elected president, and had the control and management of the road and the affairs of the company from that time until the commencement of proceedings to foreclose. The company had neither resources nor credit, and the earnings of the road were barely sufficient to keep it running, without making needed repairs and improvements. The construction of the forty-eight miles of road seems to have absorbed the proceeds of the \$720,000 first mortgage bonds of the company, and of state aid and state levee bonds, and county and municipal subscriptions, amounting in the aggregate to some \$2,000,000. The company was hopelessly insolvent. No interest was

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paid on its first mortgage bonds, and on the twentieth day of September, 1876, the trustee filed a bill in the United States district court at Helena, then in the western district, to foreclose the mortgage. The bill alleged that the holders of one-third in amount of the bonds had requested the trustee to foreclose. A receiver was appointed, upon whose application Judge Parker authorized the issue of receiver's certificates to the amount of \$75,000, to make necessary repairs and improvements on the road. Between the date of this order and the next term of the court, Helena was transferred to this district, and the judge of this district rescinded the order authorizing the receiver to issue certificates. The rescinding order was not made because the road did not stand in need of repairs. It was notoriously true that its condition was such as to make it dangerous to life and property to run cars over it; ties were rotten, iron worn out, rolling stock in bad condition, bridges insecure, culverts washed out, and the road-bed in many places too low, resulting in overflows of the track and stoppage of trains. No repairs nor betterments had been put upon the road since it had been built.

It seems to be settled that a court of equity has the power in this class of cases to authorize its receiver to issue certificates of indebtedness, and make them a first lien upon the road, for the purpose of raising funds to make necessary repairs and improvements. *Wallace v. Loomis*, 97 U. S. 146, 162; *S. C. 2 Woods*, 506, under title, *Stanton v. Alabama & C. R. Co.*

But it is a power to be sparingly exercised. It is liable to great abuse, and while it is usually resorted to under the pretext that it will enhance the security of the bondholders, it not unfrequently results in taking from them the security they already have, and appropriating it to pay debts contracted by the court. The history of *Wallace v. Loomis*, *supra*, furnishes an instructive lesson on this subject.

This court has uniformly refused to arm its receivers with

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such a dangerous power. When the road cannot be kept running without its exercise, except to a very limited extent, the safe and sound practice is to discharge the receiver or stop running the road, and speed the foreclosure.

In the case of *Paine v. Little Rock & Ft. S. R. Co.*, April term, 1873, application was made to this court to authorize a receiver to issue certificates, which were to be a first lien, to build sixty miles of road, in order to earn a large and valuable land grant, which would lapse in a short time unless the road was completed. A majority in value of the first mortgage bondholders concurred in the application; and the orders of the court in the case of *Stanton v. Alabama & C. R. Co.* 2 Woods, 506 (the case was not there reported), and the case of *Kennedy v. St. Paul & Pac. R. Co.* 2 Dill. 448, were pressed upon the attention of the court. But the order was refused upon the ground that it was no part of the duty of a court of chancery to build railroads, and that the assent of all the parties interested in the property could not make it such. And there is no difference, so far as relates to this question, between building a railroad and making extensive and general repairs and betterments, the cost of which sometimes approximates the cost of original construction. In the case referred to, of the Fort Smith Railroad, the proceedings to foreclose were speeded, and a decree rendered to meet the exigencies of the case; which the supreme court approved, and said "was a much more desirable plan" than to issue receiver's certificates. *Shaw v. Railroad Co.* 100 U. S. 612.

Before the order authorizing the receiver to incur debts for repairs and other purposes was rescinded, he had incurred debts to the amount of some \$22,000, chiefly for ties and a machine shop. The ties were indispensable if trains were to be kept running, and the machine shop was a necessary and valuable property to the road, and its use a necessity, though that could probably have been had without purchasing the property. A final decree of foreclosure was rendered on the seventeenth day of March, 1877. By

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the terms of the decree the purchaser was required to pay \$40,000 in cash. This sum was required to pay the receiver's certificates and other costs and expenses of foreclosure. Any amount bid in excess of the \$40,000 could be paid in first mortgage bonds. Unusual pains were taken to convey to the bondholders actual notice of the foreclosure proceedings, and holders of \$661,000 out of a total of \$720,000 of the first mortgage bonds had actual notice of the foreclosure proceedings, and the time and place of sale. The present plaintiffs had opened negotiations looking to a foreclosure of the mortgage before the bill for that purpose was filed by the trustee; and before the sale under the decree it filed and proved in the master's office bonds to the amount of \$461,000, being the very bonds on which this suit is bottomed. The road was sold at the master's sale for \$40,000 to S. H. Horner as trustee for A. H. Johnson, the then president of the railroad company and superintendent of the road under the receiver.

The plaintiff, by its agent, had notice of this sale, and appeared by its attorney in court and moved to open the biddings for the road, and the court passed an order that the biddings would be opened if the present plaintiff or any person should advance the bid \$5,000 during a period of ten days allowed for that purpose. The plaintiff, or its agent, declined to open the biddings. In the meantime Johnson had grown sick of his bargain, and made application to the court to set aside the sale and permit him to withdraw the purchase money. This was refused and the sale confirmed. Johnson then offered to turn the road over to the plaintiff, or any holders of the first mortgage bonds who would pay him the amount of his bid within a period of some fifty days. This offer was communicated to the plaintiff by its agent, Sully, and declined.

It is clear, from the evidence, that the defendants Johnson and Horner and the citizens of Helena wished to have the bondholders purchase the road. They were extremely

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anxious that the road should be completed, and believed that its purchase by the bondholders would insure that result, and that nothing else would. After the plaintiff and other bondholders declined to take Johnson's purchase off his hands, he proceeded, as fast as he could raise means for that purpose, to put the necessary repairs and improvements upon the road, which embraced fifty thousand new ties, five miles of new iron, the rebuilding of nearly all the bridges and culverts, raising the road-bed in many places, and extensive repairs of the rolling stock. He afterwards sold a half interest in the property to his co-defendant, John J. Horner. Not long after the purchase, railroad securities and property in the south appreciated very much, and, although the road in question was but a fragment, its value was enhanced by the general and unprecedented increase in the value of all railroad property. Its value was further enhanced by the construction of a trunk line—not projected when Johnson purchased—from Missouri to Texas, which connects with its western terminus at Clarendon, and by the extensive repairs and improvements put upon the road, which altogether made it worth from \$100,000 to \$200,000 at the time this suit was commenced, supposing it to be free from incumbrances prior in time to the mortgage under which defendants claim.

The bill, which was filed five years after the sale, seeks to charge against him, the Union Trust Company, and others, relating to the foreclosure and sale, and for alleged inadequacy of price. The latter charge was abandoned at the hearing, the counsel for the plaintiff conceding on the argument that the road sold for all it was worth in its then condition, and in view of the question of the lien for the state aid bonds.

The rule is well settled that in the absence of fraud the beneficiaries in railway mortgages are bound by what is done by their trustee.

“In such cases the trustee is in court for and on behalf of

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the beneficiaries; and they, though not parties, are bound by the judgment, unless it is impeached for fraud or collusion between him and the adverse party. The principle which underlies this rule has always been applied in proceedings relating to railway mortgages where a trustee holds the security for the benefit of the bondholders." *Kerrison v. Stewart*, 93 U. S. 155, 160. "The trustee of a railroad mortgage represents the bondholders in all legal proceedings carried on by him affecting his trust, to which they are not actual parties, and whatever binds him, if he acts in good faith, binds them. If a bondholder not a party to the suit can under any circumstances bring a bill of review, he can only have such relief as the trustee would be entitled to in the same form of proceeding." *Shaw v. Railroad Co.* 100 U. S. 605, 611. Although the bill charges fraud in general terms upon the trustee, in connection with the foreclosure suit, there is not a syllable of evidence to support the charge.

One point much relied on at the hearing to support the bill was that the bill to foreclose was filed by the trustee without the written request of the holders of one-third in amount of the bonds then outstanding, as required by the twelfth article of the mortgage; and that the decree requiring the payment of the principal sum of the mortgage debt was therefore erroneous. The late cases of the *Chicago, D. & V. R. Co. v. Fosdick*, 1 Sup. Ct. Rep. 10, United States supreme court, are cited in support of this contention. The ruling in those cases does not aid the plaintiff's case for several reasons: (1) The mortgage in the case at bar contains an important provision on the subject which was not contained in the mortgage under consideration in the cases cited, and which would seem to authorize all that was done by the trustee, and the decree of the court for the whole debt. (2) It was undoubtedly competent for the trustee to file a bill to foreclose for the interest actually due, and that largely exceeded in amount the value of the road. (3) The railroad company does not complain of the decree, and the

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plaintiff is estopped to do so by reason of having filed and proved in the master's office more than one-third in amount of all the bonds issued, with full knowledge of all the facts. This was a ratification of the action of the trustee. (4) If it be conceded that the requisition of the holders of one-third in amount of the bonds was indispensable to authorize a decree for the full sum of the mortgage debt, that fact would not affect the jurisdiction of the court or the validity of its decree when collaterally attacked. The jurisdiction of the court to pronounce a decree in the case is not contested, and if it rendered a decree for more than was due it was error merely, which might have been corrected on appeal by the proper party in apt time. But if it be conceded that it was an error, it was one of which the trustee could not complain; and there being no fraud on the part of the trustee the bondholders are as much bound as the trustee, and cannot avoid the decree in any form of proceedings. *Shaw v. Railroad Co. supra.*

It is needless to discuss in detail the charges of fraud contained in the bill. The plaintiff has lost all right to be heard by its own gross laches. In excuse for the long delay the bill alleges the plaintiff was ignorant of the facts until recently. This allegation is not true. The plaintiff's agent had notice of all the facts, and testifies he communicated them to the plaintiff immediately after the sale. But the bill itself does not state a case that will excuse the delay. "A general allegation of ignorance at one time and knowledge at another is of no effect. If the plaintiff made any particular discovery, it should be stated when it was made, what it was, how it was made, and why it was not made sooner. . . . There must be reasonable diligence, and the means of knowledge are the same, then, in effect, as the knowledge itself." *Wood v. Carpenter*, 101 U. S. 135, 140; *Harwood v. Railroad Co.* 17 Wall. 78; *Badger v. Badger*, 2 Wall. 87.

In *Harwood v. Railroad Co. supra*, there was a delay of

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five years, and in *Twin-lick Oil Co. v. Marbury*, 91 U. S. 587, there was a delay of four years, and the court denied relief in both cases on the ground of laches. In the case last cited, the defendant, at the time he purchased the corporate property, was a stockholder and director in the company, and the bill, which sought to charge him as a trustee, was filed by the company, and not, as in the case at bar, by a bondholder. All parties in this case were authorized to bid at the sale, and the fact that Johnson was president of the railroad company and the plaintiff a holder of the bonds of the company did not in itself raise a trust relation between them, which would entitle the latter to charge the former as a trustee, and at its election treat his purchase as though made in trust for its benefit. It could only avail itself of Johnson's purchase by virtue of some agreement or fraudulent act on his part. The plaintiff does not rely upon any agreement, and if the conduct of Johnson was such as to entitle the plaintiff to avoid his purchase or avail itself of his bid, it ought to have exercised the right within a reasonable period. It could not delay the assertion of this right to enable it to decide, in the light of subsequent events, whether it would or not be profited by its assertion.

In *Twin-lick Oil Co. v. Marbury*, *supra*, Mr. Justice Miller says: "No delay for the purpose of enabling the defrauded party to speculate upon the chances which the future may give him of deciding profitably to himself whether he will abide by his bargain or rescind it, is allowed it in a court of equity." That is precisely what the plaintiff asks the court to permit it to do in this case. It declined to take the property at the price bid by Johnson, because, as matters then appeared, that seemed to be all or more than the property was worth. It was patent to all at the time of the sale that the alternative would be presented to the purchaser of expending at once a large sum for repairs and improvements on the road, or abandoning its use as a railroad altogether. And after these expenditures had been made it

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was exceedingly doubtful whether the earnings of the road would equal its running expenses. In view of these facts, and the further fact that it was claimed then that the lien for the \$1,350,000 state aid bonds issued to the road was paramount to the lien of the mortgage under which the road was sold (which is still an open question so far as relates to this road), it is not suprising that it was difficult to find a bidder for the property at the minimum price fixed in the decree, or that the plaintiff declined to take it at that price. Years afterwards, and when the property had greatly increased in value from causes not then foreseen, and from extensive repairs and improvements put upon it, and after other interests had intervened, and the plaintiff erroneously supposed the question of the lien for the amount of the state aid bonds was out of the way, it files this bill, and asks that it be permitted to do now what it declined to do then, take the property at Johnson's bid, and that he be decreed to be a trustee and required to account.

A more inequitable demand, considering the facts of the case, was probably never addressed to a court of equity. If it was settled that there was no lien on the road to secure the state aid bonds, the case would not be any more favorable for the plaintiff. Having declined to take the risk of purchasing the property when it was doubtful whether the investment would entail a loss or yield a profit, it should not be permitted at this late day and in the light of subsequent events to reconsider that resolution. The profits, if in the end there are any, justly belong to the purchaser, who took the risk, and whose labor and capital have added largely to the value of the property. As was said by the court in *Wood v. Carpenter, supra*, it is impossible "to avoid the conviction that the plaintiff's conduct marks the difference between forethought in one condition of things and afterthought in another."

Laches need not be pleaded. If the objection is apparent on the bill itself, it may be taken by demurrer. *Maxwell v.*

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Kennealy, 8 How. 222; *Lansdale v. Smith*, 16 Cent. Law J. 28 [S. C. 1 Sup. Ct. Rep. 350]. And if the cause, as it appears on the hearing, is liable to the objection, the court will refuse relief, without inquiring whether there is a demurrer, plea or answer setting it up. *Sullivan v. Portland R. Co.* 94 U. S. 811; *Badger v. Badger*, 2 Wall. 95.

The plaintiff and all other purchasers of the first mortgage bonds have undoubtedly lost the money invested in them. But they did not lose it by the foreclosure proceedings. It was lost from the instant it was invested in bonds secured by a mortgage on a road which had an existence only in name. If they have any just ground of complaint, it would seem to be against those whose representations induced them to purchase the bonds, and who probably used the proceeds for purposes other than building the road.

Let a decree be entered dismissing the bill for want of equity, at plaintiff's costs.

N. & J. Erb, for plaintiffs.

U. M. & G. B. Rose and *C. C. Waters*, for defendants.

 UNITED STATES v. JENSON.

(Southern District of Iowa. January, 1883.)

1. STATUTORY OFFENSE — INDICTMENT. — Where sections 5485 and 4785 of the Revised Statutes must be construed together in order to constitute the offense charged in the indictment, and section 4785 has been repealed before the commission of the offense alleged, by a subsequent amendment thereto, it is wholly inadmissible, in dealing with the criminal provisions of section 5485, to extend them by construction to the future acts of congress, when, by the express words of the section, its provisions are confined to the then existing pension law, of which the amended section was a part.
2. VERDICT — SUSTAINED BY ONE GOOD COUNT. — Where the verdict in a criminal case is general, if any one count in the indictment is good, the judgment cannot be arrested.

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Motion in arrest of judgment.

LOVE, *District Judge*.—The prisoner in this case stands convicted by the jury upon an indictment containing nine counts, in each of which he is charged with taking a compensation for prosecuting a pension claim in excess of the sum allowed by the pension laws. He now moves in arrest of judgment upon two grounds: *First*, because of duplicity in the various counts in the indictment; *second*, because section 4785 of the Revised Statutes, which is essential to his conviction, was repealed before the commission of the offenses as alleged in the indictment. These grounds will be disposed of in their reverse order.

As to one of the principal questions involved in this motion there is a direct conflict between two eminent federal judges in the respective districts of Ohio and Indiana, as will be seen by reference to the cases of the *U. S. v. Mason*, 8 Fed. Rep. 412, and *U. S. v. Dowdell*, id. 881.

I shall, therefore, be compelled to resolve this question by considering rather the reason of the law itself than the authority of these adjudged cases. And in this view it is my opinion that the prosecution cannot be sustained upon the first, second, third, fourth and eighth counts of the indictment. In each of these counts it is alleged that the offense was committed at a time which was prior to March 3, 1881. These counts are based mainly, though not entirely, upon section 5485 of the Revised Statutes of the United States. In that section it is provided that "any agent or attorney, or any other person instrumental in prosecuting any claim for pensions or bounty land, who shall directly or indirectly contract for, demand or receive, or retain any greater compensation for his services or instrumentality in prosecuting a claim for pension or bounty land than is provided in the title pertaining to pensions, shall be deemed guilty of a high misdemeanor," etc.

It is clear that the counts referred to could not be main-

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tained upon this section alone, for it contains no complete definition of the alleged offense. It provides that the offender shall be liable to prosecution when he demands or receives a greater compensation for his services in procuring a pension than is allowed in the title of the Revised Statutes pertaining to pensions.

It is evident, therefore, that we must look to that title for one of the essential elements of the offense, and we find that element in section 4785 of the Revised Statutes. That section is as follows:

"Sec. 4785. No agent, attorney or other person shall demand or receive any other compensation for his services in prosecuting a claim for a pension or bounty land than such as the commissioner of pensions shall direct to be paid to him, not exceeding \$25."

Taking sections 5485 and 4785 together, the offense plainly consists in the agent or attorney demanding or receiving any other compensation for his services than such as the commissioner of pensions directs to be paid to him, not exceeding \$25. If section 4785 did not exist there would be no completely defined offense, and the offender could not be prosecuted by virtue of the provisions of section 5485 alone. Now, section 4785 did not exist in force when the offenses as alleged in the several counts in question were committed; for section 4785 was expressly repealed by the act approved June 20, 1878, "relating to claim agents and attorneys in pension cases." This act declared that it should be unlawful for any agent or attorney to charge for his services in a single case more than \$10; and it in express terms repealed section 4785.

Section 4785 being thus repealed, section 5485 stood alone as a basis of the prosecution at the time when, according to the allegations of the several counts referred to, the prisoner's offenses were committed. It was not provided by section 5485 that the offender should be liable generally for taking illegal compensation, or for taking compensation in

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excess of the amount allowed by any and every act of congress, present or future. It was expressly provided in that section that the offender should be liable to prosecution for taking compensation in excess of the amount provided by a particular act of congress then in existence and expressly mentioned. No mention or reference whatever is made in section 5485 to any future act that congress might pass. So in the act of 1878 no reference whatever is made to section 5485. That act simply provides that no agent or attorney shall in a single case charge for his services more than \$10, and that section 4785 should be repealed. It would, I think, be wholly inadmissible, in dealing with the criminal provisions of section 5485, to extend them by construction to future acts of congress, when by the express words of the section its provisions are confined to the then existing pension law. Suppose congress had seen fit by the act of 1878 to repeal the whole title upon pensions referred to in section 5485, and had made a new pension law, would the penal clause in section 5485 have been continued in force by the terms of the act of 1878?

Let us pass next to the consideration of the fourth, fifth, sixth and ninth counts of the indictment. In each of these counts it is alleged that the offenses were committed at various times which were subsequent to the third day of March, 1881. Now, on the third day of March, 1881, congress, in the general appropriation bill, provided that the "provisions of section 5485 of the Revised Statutes should be applicable to any person who should violate the provisions of an act entitled an act relating to claim agents and attorneys in pension cases, approved June 20, 1878." We have seen that this act of 1878 provided that it should be unlawful for any agent or attorney to charge for his services in a single pension case more than \$10; and for a violation of this act it was provided, in the act of March 3, 1881, that the offender should be liable to prosecution under the provisions of section 5485. Now, in the fourth, fifth, sixth and ninth counts,

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it is charged that the prisoner at the bar, at times which were subsequent to the third of March, 1881, received from the several parties therein mentioned sums greatly in excess of the sum of \$10 authorized by the act of 1878. It seems clear, therefore, that the prosecution is maintainable under the counts last mentioned by virtue of the provisions of the act of 1881.

The ground of duplicity urged by the prisoner in arrest of judgment is that to demand and receive compensation are distinct and separate offenses under the statute, and that these distinct and separate offenses are united in the several counts of the indictment.

But even if this ground be tenable, it cannot be sustained in opposition to the present indictment, because it is expressly alleged in the fourth count that the prisoner, on the fifteenth day of January, 1882, received from one Henry Pansean the sum of \$200 as compensation for prosecuting Pansean's claim; and if any one count of the indictment be good, the verdict being general, the judgment cannot be arrested.

Motion overruled.

J. S. Runnells and *W. T. Rankin*, for the United States.

James T. Lane, for defendant.

PARODY v. CHICAGO, M. & ST. P. R'Y CO.

(*District of Minnesota. December, 1882.*)

1. **MASTER AND SERVANT — DEFECTIVE MACHINERY — LIABILITY OF MASTER FOR PERSONAL INJURY TO SERVANT.**— Where a master has expressly promised to repair a defect in the machinery used by the servants in his employment, the servant may recover for an injury caused thereby within such a period of time after the promise as would be reasonable to allow for its performance.

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2. **SAME — PROMISE BY AGENT OF MASTER.**— A promise to repair made by the agent of the master is binding on the master, but the burden of proof is on the plaintiff to establish such promise.
3. **SAME — MEASURE OF DAMAGES.**— The award of damages in such cases must not be excessive. They are only to be remunerative,—compensatory,— a just and fair amount for the injury sustained.

NELSON, *District Judge (charging jury).*— This suit is brought to recover damages for a personal injury. The plaintiff was in the defendant's employment as brakeman on a switch-engine in defendant's yard. His duty was to couple the engine to cars in making up and breaking trains. He alleges the injury complained of was the result of a defective and unsuitable draft-iron or draw-bar attached to the engine, and that he informed the yard-master of the danger attending its use, who promised to remove it, but failed to do so. The defendant takes issue upon the alleged defective construction of the draw-bar and danger in its use, and it being conceded that the plaintiff remained in the service of the defendant, coupling with this draw-bar, after knowledge of its danger, alleges that it is not responsible for the injury. The issue is sharply defined, and presents in connection with the facts for your determination, a consideration of an exception to the rule exempting the common employer from liability to one employee for an injury caused by the negligence of a fellow employee, and in some respects the duty and obligation of a railroad company to its employees. The burden of proof is on the plaintiff, and he must establish to your satisfaction that the injury occurred; that the draw-bar was dangerous to operate and defective in construction, and that he informed the yard-master of the fact, who promised to remedy the defect, but did not; and that the draw-bar was the approximate cause of the injury.

There is evidence tending to show that the draw-bar was an improper one, and not in ordinary use by the company in the yard; that the switch-engine upon which plaintiff worked when first employed did not have it attached; and

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that shortly after he worked upon this engine he complained to the yard-master, telling him that it was dangerous, who promised to remove it, but did not, and that he remained at work after complaint and unfulfilled promise until, on May —, 1882, he was injured.

The evidence on behalf of the defendant tends to show that due care had been exercised in selecting the draw-bar; that it was safe and not defective in construction, nor dangerous, but safer than ordinary draw-bars in use by the company; that it had no notice of any complaint from the persons using it, and never promised to remove it.

It was necessary for the defendant to use switch-engines in the yard with draft-irons or draw-bars at each end, in order to properly conduct its business; and in supplying such engines for this work it was the duty of the defendant to exercise reasonable care in the selection of suitable and safe appliances to be used. It owed this duty to the plaintiff. It was under no obligation to furnish the safest known draw-bar. If the company observed all the care which prudence suggested, and was required by the exigencies of the situation, in securing and furnishing a draw-bar adequately safe for the plaintiff to use, it fulfilled its duty and performed its part of the contract.

The work of coupling is an exceedingly hazardous one under the most favorable circumstances, and when the plaintiff entered such service it was implied in the contract between himself and the defendant that he assumed the dangers which ordinarily attend the performance of his work in which he voluntarily engaged, and that he risked these dangers for the compensation paid him. If he was not satisfied with the service, he could withdraw. If it was too dangerous, and attended with great risks which he did not care to take, the defendant could not compel him to remain, and if he did the company did not absolutely insure his safety.

The injury being conceded, the first question for you to

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decide is, was the draw-bar attached to the engine so defective in its construction and manner of use that it was dangerous? The affirmative of this issue is upon the plaintiff, and he must prove by the preponderance of evidence that this draw-bar was a dangerous appliance and entirely insecure for coupling, and that the defendant, in the selection of it, was wanting in care. If he has not satisfied you by the evidence that the defendant failed to exercise reasonable care in purchasing and providing this draw-bar, and you believe it reasonably safe if proper care was exercised in its use, then the defendant is entitled to a verdict for the reason that it has fulfilled its duty and obligation in respect to the appliance furnished. On the other hand, if you should arrive at the conclusion that the draw-bar was dangerous and defective in its construction, and also that the company failed to exercise such caution as would ordinarily suggest itself to a prudent person, then you are to further consider whether the defendant was informed of its dangerous and defective character, and promised to remedy it and provide another.

In regard to the notice required to inform defendant of this, it is sufficient that notice was given to that agent or servant of the defendant who made a requisition for the appliances necessary to be used in the yard of the defendant, and whose duty it is to guard against injurious consequences of defects in the particular appliances used therein. Such a person is the yard-master. He represents the company, and since it delegated to him the authority to make requisition for engines, etc., for the use of the yard, notice to him of dangerous draw-bars will be notice to the defendant. He is the proper person, and if, after such notice, he promised to remedy it, a failure to do so is the negligence of the defendant. The evidence of notice to the yard-master and a promise to remedy is conflicting. The burden of proof is upon the plaintiff to show it. He must prove by a preponderance of evidence that he gave the notice and that the promise was

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made. The plaintiff and some of his witnesses testify to the fact, and the yard-master is equally positive that no complaint was made by the plaintiff or by any one for him or in his presence, and that he never promised to have the draw-bar removed.

The plaintiff must prove that the defendant had notice of the danger in using this draw-bar, and promised to remedy the defects; for in no view of the case can he recover, although the draw-bar was dangerous, unless he can satisfy you of knowledge by the defendant, and a promise to furnish a safe and secure draw-bar. If he has not by the preponderance of evidence proved this, then he must fail in his action, and your verdict will be for the defendant.

If, however, you find that the yard-master was notified of the danger in using this draw-bar, and that he promised to remove it or remedy the defect, then, before the plaintiff can recover, you must consider further and determine whether the plaintiff, in remaining in defendant's employ, assumed all the risk and danger of working with this draw-bar under the circumstances.

The following rule is recognized by the supreme court (see 100 U. S. 225):

"There can be no doubt that, where a master has expressly promised to repair a defect, the servant can recover for an injury caused thereby within such a period of time after the promise as it would be reasonable to allow for its performance, and, as we think, for an injury suffered within any period which would not preclude all reasonable expectation that the promise might be kept."

If, in your opinion, the time that elapsed was unreasonable, and the plaintiff was not justified in relying upon the assurance of the defendant to remedy the defect, and that no prudent man would continue the employment when so long a time had elapsed after notice of the defect was given, and the promise to remedy it not fulfilled, the liability of the company ceases, and by remaining he was wanting in care

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and contributed to his injury, and the defendant is entitled to a verdict.

If, however, under all the circumstances, in view of the promise to remedy the defect, the plaintiff exercised due care in continuing to use this draw-bar, and was free from fault at the time of the injury, then he is entitled to a verdict.

Should you so find, the damages which you award must not be excessive. They can only be remunerative,—compensatory,—a just and fair amount for the injury sustained. Verdict for plaintiff.

See *King v. Ohio, etc. R. Co.* 14 Fed. Rep. 277.

Ueland & Shores, for plaintiff.

Bigelow, Flandreau & Squires, for defendant.

 SPITLEY v. FROST and others.

(District of Nebraska. February, 1883.)

1. **EQUITY — HOMESTEAD LAWS — WIFE'S INTEREST.**— Under the homestead laws of Nebraska enacted in 1866, the wife had no vested interest in the homestead, and was, therefore, not a necessary party to any judicial proceedings relating to it. The supreme court of Nebraska has held that the homestead law in force when a contract is made is the one that shall govern in subsequent proceedings in reference thereto.
2. **SAME — POWER OF THE COURT IN CASES AFFECTING HOMESTEADS.**— The court in which a case affecting the homestead is pending may exercise such power only as the parties before it might, in the absence of judicial proceedings, exercise over the subject matter.
3. **SAME — RETROSPECTIVE LAWS.**— It is only where the intent of the legislature to make an act retrospective is plainly expressed, that courts will undertake to apply it to antecedent contracts, and determine whether it impairs their validity.
4. **SAME — EXEMPTION LAWS — PERSONAL PRIVILEGES.**— The general doctrine is recognized that exemption laws are grants of personal privileges to debtors, which may be waived by contract or surrender, or by neglect to claim before sale.

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5. RES ADJUDICATA—WHAT ORDERS ARE.—There is a distinction to be noted between orders made upon motions respecting collateral questions arising in the course of a trial and final orders affecting substantial rights, and from which an appeal lies: the latter are *res adjudicata*, and binding upon the parties, unless reversed or modified by an appellate tribunal.

In equity. Upon rehearing.

The controlling question in this case is whether the sale of the real estate in controversy, under the judgment of this court, in a case in which John I. Redick was plaintiff, and the respondent, George W. Frost, alone, was defendant, rendered in a suit in attachment, was a valid sale. The premises had been levied upon by writ of attachment at the commencement of the suit, and upon final hearing there was judgment, with an order for the sale of the attached property under a special execution. The contention of the respondents George W. Frost and wife, in the present case, is that the levy and sale were void, because the premises were their homestead, and therefore exempt from judicial sale under the laws of Nebraska. After the sale under the execution in the case of *Redick v. Frost*, a motion was made to confirm the same, which motion was opposed by Frost, on the ground, among others, that the premises constituted his homestead; but the sale was nevertheless confirmed. Subsequently the said George W. Frost moved the court to set aside the sale on several grounds, and among them upon the ground that the premises constituted his homestead, and were therefore exempt. Thereupon the court referred the case to a referee to take testimony upon the question of homestead; and testimony upon both sides was accordingly taken, and a report thereon was made, upon consideration of which the court overruled the motion to set aside the sale.

The question in the present case is whether the judgment of the court confirming the sale and overruling the motion to set the same aside is a final adjudication of the homestead question by which the parties are bound, and which estops

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the present defendants to claim the property as a homestead.

McCREARY, *Circuit Judge*.—Upon the former hearing it was assumed that the question whether the premises in controversy were exempt as the homestead of respondents Frost and wife was a question arising under the provisions of an act of the legislature of Nebraska entitled "An act to exempt homesteads from judicial sale," approved February 19, 1877; and as that act vested the homestead right in the husband and wife jointly, and expressly provided that no conveyance or incumbrance of the homestead should be of any validity unless executed by both, it was held that the wife was a necessary party to any proceeding to subject property claimed as a homestead to judicial sale. It resulted from this ruling that, in the judgment of the court, the respondents Frost and wife were entitled to a decree setting aside the sale under execution of the premises in question, notwithstanding the confirmation of that sale by this court in a proceeding in which the wife was not joined with the husband as a party. If there was no error in assuming that the act of 1877 was the governing statute, I am of the opinion that the former ruling was entirely correct. But it is now suggested that an earlier homestead act,—that of 1866,—being the act in force when the contract was entered into, is the governing statute, and that under that statute the wife had no vested interest in the homestead independently of her husband, and was therefore not a necessary party to any judicial proceeding relating to it. Gen. St. 616.

It is true that the last named act, which was the homestead law in force when the contract was made, only exempted the homestead owned "by the head of the family." It did not provide, as the more recent act does, that the homestead of the *family*, whether owned by the husband or wife, should be exempt; nor did it contain the provision

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now found in most homestead laws, that no deed or mortgage of the homestead shall be of any validity unless executed by both husband and wife, if both are living. Under this statute, had the wife an interest in the homestead which could not be divested in a proceeding against the husband alone, the title being in him? Both upon authority and principle I am constrained to hold that where the wife has no power to prevent the voluntary alienation of the homestead by the husband, she is not a necessary party to a proceeding to subject it to judicial sale, or to determine whether a given piece of property is a homestead. The cases cited in the former opinion, and other like cases, in which it is held that the wife is a necessary party to any judicial proceeding affecting the homestead, are all, it is believed, cases which arose under statutes conferring homestead rights upon the wife, and placing those rights beyond the control of the husband. The statute now under consideration does not do this. It provides only for the exemption of a homestead to be selected by the owner, "so long as the same shall be *owned* and occupied by the debtor as such homestead." The wife is not mentioned in the act; and however vital her interest in the home may be, we cannot hold that she has, in the absence of a statute to confer it, any legal interest in the property of the husband, such as to make her a necessary party to any proceeding touching the title or possession.

It has been repeatedly held by the supreme court of Nebraska that the wife had no control over the homestead, and no legal interest therein, under the statute in question. Thus, in *Rector v. Bottom*, 3 Neb. 171, it was held that the homestead right under that statute was a purely personal one, which the owner could at any time waive or renounce, and that it was lost by a failure of the owner at the time of a levy upon it to notify the officer of what he regards as his homestead. It was there held, also, that the exemption was a right guarantied to the head of the family, who was at perfect liberty to sell the homestead or pledge it for the

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payment of his debts if he chose to do so. "The legislature," says the court, by Lake, C. J., "never intended to assume a guardianship over the owner of the homestead and render him disqualified to make valid contracts respecting it. It imposes no restraint upon him whatever in this respect; *even the wife, when the title is in the husband, has no power to prevent him from making such disposition of it as he may think best.*" The same language is repeated in *State Bank v. Carson*, 4 Neb. 501.

Accepting, as we are bound to do, this construction of the statute, we are unable to perceive any satisfactory ground for holding that a court of competent jurisdiction may not dispose of the question of homestead arising under it in any case where it properly arises, and to which the owner of the homestead is a party. It is only for the reason that the husband is, by law, deprived of the power to dispose of or incumber the homestead without the wife's concurrence, that it has been held under some statutes that the presence of both before a court is necessary to the jurisdiction of the court over the question of homestead rights.

The court in which a case affecting the homestead is pending may exercise such power only as the parties before it might, in the absence of judicial proceedings, exercise over the subject matter. If the husband alone is in court, the power of the court is limited to his interest, and where this cannot be divested without the presence of the wife the court is powerless. But where the entire control of the homestead is vested in the husband, the wife's presence as a party in court is not necessary.

It is insisted that the statute that we are considering does not govern the decision of this case. It is conceded that it was in force when the contract was entered into; but a later act (that of 1877) was enacted after the contract was made, and before the judgment was obtained or the sale made. This latter act, it is said, ought to be adopted as the law of this case, for the reason that it does not enlarge but diminish

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the amount of the homestead exemption. By the former act the value of the exempted property was left with no limit; by the latter it is limited to \$2,000. By the former, as we have seen, the exemption was for the benefit only of the head of the family, and the property was left under the entire control of the owner; by the latter it is for the benefit of the family, and the wife is given a vested right in and control over the homestead. Counsel have discussed the question whether this last act can be applied to pre-existing debts without impairing the obligation of contracts. In one respect the homestead exemption is very much enlarged by the act of 1877, which extends the benefits of the exemption to the wife, and makes her consent necessary to its alienation, and there is force in the suggestion that to apply the latter act to the determination of this case, under the existing circumstances, would very seriously impair the rights of the complainant. This question does not, however, necessarily arise and it is not decided. The act of 1877 does not purport to be retroactive, and should, therefore, not be held to be so. It is only where the intent of the legislature to make an act retrospective is plainly expressed, that courts will undertake to apply it to antecedent contracts, and determine whether it impairs their validity. If, consistently with the terms of this act, it can be made to apply only to subsequent contracts, it should be so construed. *Thomp. Homesteads and Exemptions*, § 9. The supreme court of Nebraska has accordingly held that the homestead law in force when the contract was made is to govern. *Dorrington v. Meyers*, 9 N. W. Rep. 555. This rule is binding upon this court, and is, besides, in accordance with our view of the law.

We are brought to the conclusion that the act of 1866, which was in force when the contract was made, entered into and became a part of it, and must be looked to as determining the rights of the parties under it.

In this view of the case we are again to consider whether

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the homestead question was finally adjudicated and settled in the case of *Redick v. Frost*. And it is a wholly different question from the one considered and decided upon the former hearing, because it must now be discussed in view of the fact now ascertained that Frost, the husband and owner of the homestead, was the only necessary party to that proceeding. It is undoubtedly true that if the court had jurisdiction to pass upon the question of homestead, and did pass upon it by a final order, the judgment not having been appealed from is final. The statute of Nebraska provides that upon the return of any writ of execution upon which real estate has been sold, the court shall carefully examine the proceedings of the officer, and if satisfied that the sale has in all respects been made in conformity to the statute, shall direct the clerk to make an entry on the journal that the court is satisfied of the legality of the sale, and an order that the officer make to the purchaser a deed, etc. Gen. St. 1873, § 498. The general doctrine is recognized that exemption laws are grants of personal privileges to debtors, which may be waived by contract or surrender, or by neglect to claim before sale; and it is probably true that where the homestead exemption is a personal privilege, granted to the owner alone, as in this case, and the homestead is seized on attachment in a case in which the owner is a party, it is his duty to claim the exemption in the progress of the case, and before there is judgment, execution, and a sale. *Thomp. Homesteads*, etc. § 646. But, however this may be, it appears in this case that the respondent, George W. Frost, did not claim the exemption in opposition to the confirmation of the sale, and also as the basis of an application made by him to the court to set the sale aside. It would seem that it was necessary for the court to decide the question of exemption in order to determine the question presented by this application. If the property was exempt the sale was void, and should have been set aside. In order, therefore, to decide the question whether it should be set aside, it was

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necessary, the question being raised, to decide whether it was exempt. The practice in Nebraska seems to be to determine questions of this character upon the hearing of motions to confirm sales made by sheriffs under execution; and the rulings of the inferior courts of the state upon such questions have been regarded as final judgments, reviewable upon appeal or writ of error by the supreme court of the state. *Rector v. Bottom*, *supra*; *Banker v. Collins*, 4 Neb. 49; *Eaton v. Ryan*, 5 Neb. 47.

It being conceded that the owner of the property claimed as a homestead, and levied upon and sold under execution, may raise the question of exemption, upon a motion to set the sale aside, and that the court must decide it when so raised, and that its decision is a judgment, how can we escape the conclusion that it is, if not appealed from, final and conclusive? In the original opinion the question was suggested whether the homestead question can, in any case, be finally adjudicated upon a motion made to the court to confirm or set aside a sale on execution of the property claimed as a homestead; but the question was not then deemed material, and was, therefore, not considered. It now becomes material and must be disposed of. There are many cases in the books which hold, as a general rule, that orders and decisions of courts made in passing upon motions are not *res adjudicata*. But there is a distinction to be noted between orders made upon motions respecting collateral questions, arising in the course of the trial, and final orders affecting substantial rights, and from which an appeal or writ of error will lie. It is believed that the test is the one here suggested. If the order is one affecting substantial rights, is in its nature a final order, and one which may be reviewed upon appeal, it is an adjudication binding upon the parties, unless reversed or modified by an appellate tribunal. This is well illustrated by two New York cases. Before the adoption of the code in that state it was held that an order made on motion in summary proceeding was not a final adjudication.

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Simpson v. Hart, 16 Johns. 63. After the adoption of the code, providing for appeals from "final orders," it was held that an order made upon a motion to set aside executions issued upon certain judgments, and to have those judgments canceled, was a conclusive adjudication as between the parties. *Dwight v. St. John*, 25 N. Y. 203. In the latter case the court say that the defendant "was the moving party, and if he objected to the order granted in any respect, he should have appealed therefrom and have had it made correctly." And again: "Since, then, a full hearing, with the right of appeal, was open to the defendant on that motion, how is he to avoid the binding effect of that decision so far as it covers what was actually and necessarily tried?" etc. And see *Freeman*, Judgm. 585, 586.

That the order confirming the sale, and that overruling the motion to set the same aside, was reviewable, appears not only from the course of practice in Nebraska, but from the terms of the statute.

By section 581 of the General Statutes it is provided that any order affecting a substantial right, made in a special proceeding or in a summary adjudication in an action after judgment, is a final order, which may be vacated, modified or reversed by the supreme court. And section 582 of the same statutes provides that "a judgment rendered or final order made by the district court may be reversed, vacated or modified by the supreme court for errors appearing upon the record." It is clear that the order in question was a final order, and that it affected substantial rights. It was, therefore, reviewable under either of said sections. Being a final order or judgment rendered by a federal court, it was in like manner reviewable by the supreme court of the United States. It was either a part of the main cause and could have been reviewed upon writ of error taking up the whole case (*New Orleans v. Morgan*, 10 Wall. 256), or it was a special proceeding under the statute, and therefore itself a suit and reviewable as such. *Parker v. Overman*, 18

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How. 137. This latter was a statutory proceeding to confirm a judicial sale instituted by the publication of notice to all persons claiming an interest in the property sold to come in and assert their rights. The decision and order of confirmation in such a case was held to be a final judgment, binding both upon absent claimants and present contestants, and as such reviewable in the supreme court of the United States.

It is suggested by counsel that it does not appear from the record that the court decided the homestead question in passing upon the motion to confirm the sale, or upon the application to set the same aside. Assuming, without deciding, that it must appear from the record that the question was *necessarily* passed upon, and that it is not sufficient to show that it might have been decided, how does the case stand? The motion was to set aside the sale on several grounds, and among them upon the ground that the property was exempt as a homestead. The motion was overruled and the sale was confirmed. In order to reach this conclusion it was necessary for the court to decide the question of homestead adversely to the respondent Frost. If the sale had been set aside by the court without specifying upon which ground, it might have been contended that the decision of the court did not necessarily involve a determination of the question of exemption; but since the sale was confirmed, it must have been because, in the judgment of the court, none of the grounds urged against the validity of the sale were good. If the court had not decided this question of exemption against the right claimed, it could not have confirmed the sale. The case comes, therefore, clearly within the doctrine of *res adjudicata*.

The question now before us arose in a former case between the same parties or their privies. It was properly presented to the court, testimony was taken, a hearing was had, and a final order was made.

The orders heretofore made respecting the issues upon the

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cross-bill of respondent Bryant are to stand without modification.

If respondents George W. and Abbie S. Frost desire an appeal, the same will be granted upon proof that the property is worth more than \$5,000, and the bond for costs will be fixed at \$500.

DODD and others v. MARTIN and another.

(Eastern District of Arkansas. October, 1882.)

1. ASSIGNMENT FOR BENEFIT OF CREDITORS — DEED OF ASSIGNMENT — FAILURE TO ATTACH SCHEDULE. — The failure to attach the schedule of property described in a deed of assignment renders the deed inoperative and void as to all property intended to be embraced in the schedule, and not otherwise described than by reference to it.
2. SAME — STIPULATIONS. — A deed of assignment containing a stipulation that no creditor shall participate in the proceeds of the property assigned unless he accepts the same in full satisfaction of his debt, is valid in Arkansas; but a deed containing such a stipulation, to be valid, must convey all the debtor's property.

On the twenty-sixth of December, 1882, the defendant executed and delivered to Allison, as assignee, a deed of assignment for the benefit of creditors. Two days afterwards the plaintiffs sued out an attachment against Martin, which was levied on a stock of goods in the possession of Allison, the assignee, and which had belonged to Martin. Martin traversed the plaintiff's affidavit, upon which the attachment was sued out, and Allison filed an interplea claiming the goods attached as assignee under the deed of assignment. Both issues were tried before the court. That part of the deed of assignment material to the case reads as follows:

"I, John A. Martin, do hereby grant, bargain and sell to T. J. Allison, assignee in trust, for the benefit of all my creditors, the goods, wares, merchandise and property hereto attached in schedule A, made a part of this conveyance, to

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have and to hold to him in trust as aforesaid forever; I conveying also to the said T. J. Allison, assignee, for the use aforesaid, all notes, books, accounts, and every class and character of evidence of debt to me belonging, or relating to my business in any manner whatever, with full authority in said T. J. Allison, assignee, to collect the same and apply them to the uses of this trust in manner and form as is by law prescribed in that behalf. The said T. J. Allison, assignee, shall proceed to collect and dispose of goods, wares, merchandise, and property, and choses in action, and apply the same to the payment of my creditors, share and share alike: provided, that no creditor herein provided for shall participate in the assets herein assigned, unless he accepts the same in full of his claim. This assignment to be closed up under the direction of creditors assenting to the same.

"December 26, 1882.

[Signed]

"J. A. MARTIN."

The deed was acknowledged and delivered, and the keys of the store, house, and possession of the stock of goods delivered to Allison as assignee under the deed at its date; but the assignee did not file the inventory and give the bond as required by section 385, Gantt's Digest, and had not done so down to the day of trial, and the schedule mentioned in the deed as being attached thereto and made part thereof was not attached, and was not made out at the time the deed was executed and delivered, nor until some time after the levy of the attachment.

U. M. & G. B. Rose, for plaintiff.

The deed is void for the following reasons:

1. It exacts releases and by implication reserves the surplus to the grantor. *Malcolm v. Hodges*, 8 Md. 418; *Whidbee v. Stewart*, 40 Md. 414; *Ingraham v. Wheeler*, 6 Conn. 277; Bump. Fraud. Conv. 430; Burrill, Assignm. § 207.

2. No time is specified within which creditors are to accept and release. Bump. Fraud. Conv. (2d ed.) 433; Burrill,

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Assignm. § 197; *Henderson v. Bliss*, 8 Ind. 100; 2 Kent, Comm. 533.

3. The schedule A mentioned in the deed not having been attached thereto, the assignment was ineffectual to convey the property intended to be embraced in the schedule. *Barkman v. Simmons*, 23 Ark. 1; *Moir v. Brown*, 14 Barb. 39.

4. The assignment took effect as to the choses in action at the time of its delivery. *Clayton v. Johnson*, 36 Ark. 406. At the time of the levy it was, therefore, a partial assignment, exacting releases, and void. Burrill, Assignm. (4th ed.) 273; Bump, Fraud. Conv. (2d ed.) 492; *In re Wilson*, 4 Pa. St. 430; *Graves v. Ray*, 13 La. 454; *Hennesy v. Bank*, 6 Watts & S. 300; *Clayton v. Johnson*, *supra*.

5. The provision that the assignment shall be closed up under the direction of the creditors assenting to the same makes the assignee the mere agent of those creditors. The assenting creditors are by this clause invested with plenary powers over the estate, and yet they are governed by no law, give no bond, take no oath, and are answerable to no one for an abuse of these powers. Nor would the assignee be responsible for obeying their orders to the prejudice of the rights of other creditors, because one of the conditions of his bond is that he "will execute the trust confided to him . . . according to the terms of the assignment," one of which is that he shall close it up under the direction of the assenting creditors.

Section 43 of the bankrupt act (sec. 5103, R. S.) authorized three-fourths in value of the creditors who had proved their debts to "wind up and settle" the bankrupt's estate by trustees appointed by them. These words were held to be large enough to embrace the entire control and management of the bankrupt's estate, and the direction of the committee of creditors to the trustee in regard to the settlement of the estate was held to be conclusive and binding on the bankrupt court and all other creditors. *In re Dorby*, 4 N. B. R.

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211; *In re Jay Cook & Co.* 11 N. B. R. 1. And if this deed is held valid, the clause in question has the effect to deprive the assignee of all control over the administration of the trust. The clause is not only without any statute authorizing it, but is in derogation of the statute, which points out specifically how the assignee shall discharge his trust. It is not for the debtor to assume that he can devise a better mode of administering the trust than that prescribed by law. Whenever he has attempted to do so the assignment has been adjudged void. *Raleigh v. Griffith*, 37 Ark. 150; *Teah v. Roth*, MS. opinion, November Term, 1882; *Schoolfield v. Johnson*, 11 Fed. Rep. 297.

6. The statute prohibits the assignee from taking possession of the property assigned until he has filed the inventory and given the bond required by law. Parties cannot defy the law with impunity. The object of the statute was to put it out of the power of an irresponsible or dishonest assignee selected by the debtor to defraud the creditors. The prohibition is addressed to the debtor as well as the assignee. An act knowingly done in violation of an express command of a statute, enacted to prevent fraud, is itself a fraud in law. No inquiry is permissible to show the statute was violated through ignorance, or for a good purpose.

7. The case of *Clayton v. Johnson* does not decide that the deed in that case was a valid deed. Objection to the introduction of the deed was not made in the court below; but after it was introduced an instruction was asked that the deed be disregarded because it contained a clause exacting releases. This was the only question of law reserved, and, of course, the supreme court could not pass upon any other point. It is clear that the deed was bad for several reasons, and that it must have been so held if the points had been raised in the trial court.

Joseph W. Martin, for defendant and interpleader.

1. The deed was inoperative for any purpose till the

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transaction was completed by attaching schedule A to the deed as contemplated by the parties.

2. This deed is a literal copy of that in *Clayton v. Johnson*, 36 Ark. 406, except this clause: "The said Johnson shall proceed to sell said goods, etc., on the best terms he can in his discretion," which is omitted. That deed was held valid. True, the main question in that case was the validity of the clause exacting releases; but before the court could render the judgment they did, they had to find the deed was not constructively fraudulent for *any reason*.

2. There is no such resulting trust or implied reservation of the surplus to the debtor as will render the deed void. *Brashier v. West*, 7 Pet. 615; *Skepoith v. Cunningham*, 8 Leigh, 271; *Gordon v. Cannon*, 18 Grat. 394; *McFarland v. Birdsall*, 14 Ind. 129; 11 Ill. 503; 3 Watts, 198; 8 Watts & S. 304; 5 Watts & S. 223; 8 Grat. 457; 58 Ala. 659; 1 Paige, 305; 17 Ala. 659; 1 Ired. 453; 4 Wash. C. C. 232.

4. The clause providing that the assignment shall be closed up under the direction of the creditors assenting to same does not render the deed void. *Kellog v. Slavoson*, 15 Barb. 56. It does not authorize the creditors to exercise any power inconsistent with the rights of all the creditors and the duties of the assignee and the rules of law. The creditors and the assignee alike would be bound to observe the law. The courts should give instruments that construction which will render them lawful. *Julian v. Rathbone*, 39 Barb. 102; *Cardegan v. Kenneth*, 2 Cowp. 432; 1 Story, Eq. Jur. § 258. It would be a strained construction to say this clause was designed to perpetrate a fraud; it has no tendency to such a result. The court will not assume that the creditors might attempt to exercise their powers unlawfully, but will rather indulge the presumption that they would act according to law and for the best interest of all.

CALDWELL, *District Judge*.—It will be observed that the deed on its face does not purport to convey all the assignor's

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property. The property conveyed is limited by the terms of the deed to that mentioned and described in schedule A, and to the choses in action which are assigned by an independent clause in the deed, and as to which the deed took effect on its delivery.

The failure to attach the schedule renders the deed inoperative and void as to all property intended to be embraced in the same and not otherwise described than by a reference to it. *Barkman v. Simmons*, 23 Ark. 1; *Moir v. Brown*, 14 Barb. 39. This being so, it results that the deed of assignment, at the time of its execution and delivery, conveyed only a part of the assignor's property. The supreme court of this state in *Clayton v. Johnson*, 36 Ark. 406, hold that a deed of assignment containing a stipulation that no creditor shall participate in the proceeds of the property assigned, unless he accepts the same in full satisfaction of his debt, is valid. But a deed containing such a stipulation, to be valid, must convey all the debtor's property. This is held in *Clayton v. Johnson*, *supra*, and is the doctrine of most of the courts which maintain the validity of such a stipulation. "It is held," says Mr. Burrill, "almost without exception, that such a stipulation in an assignment of part of a debtor's property is fraudulent." Burr. Assignm. (4th ed.) 273.

The deed, therefore, stipulating for a release and conveying only a part of the debtor's property is fraudulent and void. It imparted no title to the assignee as against an attaching creditor, and justified the plaintiffs in attaching the assignor.

The conclusion arrived at in this point is decisive of the case, and renders it unnecessary to decide the other questions so ably argued by counsel.

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BUCKNER v. STREET.

(Eastern District of Arkansas. October, 1882.)

1. **EQUITY — MISTAKE.**—The mutual mistake against which equity relieves relates to something not within the contemplation of the parties in making their contract, and, therefore, not covered nor intended to be covered by it. If there is no misrepresentation or fraudulent concealment of a material fact, or a mistake, consisting in an unconsciousness, ignorance or forgetfulness of a material fact, the contract must stand.
2. **SAME — MISREPRESENTATIONS — WHAT SUFFICIENT TO VOID CONTRACT.**—A contract may not be set aside on the ground of misrepresentation, unless it be of some material matter constituting some motive to the contract, something in regard to which reliance is placed by one party on the other, and by which he was actually misled, and not merely a matter of opinion open to the inquiry and examination of both parties.
3. **SPECIAL WARRANTY DEED.**—A deed with a special warranty against all persons claiming by, through or under the grantor, cannot be extended to a general covenant of warranty against all persons; and the rule is that a party has no remedy on the ground of a mere failure of title, if he has taken no covenants to secure the title, and there is no fraud in the case.
4. **SAME — STATUTE OF LIMITATIONS.**—In Arkansas the plea of the statute of limitations of five years to a note given for the purchase money of lands is not good in bar of a decree *in rem* for a sale of the lands; but it is a bar to the recovery of a personal judgment against the defendant.

In equity.

The plaintiff filed his bill to foreclose a vendor's lien on certain lands reserved in the deed by which he conveyed the lands to the defendant with covenant of warranty against those only "claiming or to claim the same by, through or under" the grantor. The defendant filed an answer and cross-bill identical in their statements. The plaintiff has demurred to the cross-bill and excepted to the answer.

The substance of the cross-bill is that the lands in question were owned many years ago by one Faulkner, who executed what is known as a "real estate bank stock mortgage" on

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them; that Faulkner became otherwise largely indebted to the bank, and finally conveyed the lands and other property to the bank in satisfaction of his indebtedness to it; that Faulkner and his attorney and others understood and believed that this conveyance paid and extinguished the "stock mortgage" as well as his other indebtedness to the bank; that one Sessions afterwards purchased the lands from the bank or its representatives; that Sessions became indebted to the plaintiff and executed to him a mortgage on the lands to secure such indebtedness; that this mortgage was foreclosed, and the lands purchased at the foreclosure sale by the plaintiff, who sold them for their full value to the defendant; that Sessions, at the time he purchased the lands, was advised by his counsel, Mr. Pike, and by Faulkner, that the stock mortgage was no longer a lien on the lands; that the plaintiff was also advised to the same effect by his counsel, Mr. Garland; that the defendant was advised to the same effect by Mr. Gallagher, whom he specially retained to examine the title, and by all the other parties named, including the plaintiff; that both plaintiff and defendant honestly believed the mortgage had been paid; that if defendant had not so believed he would not have purchased the lands; that the deed to the defendant was not a general warranty, and contained no covenant against incumbrances, because both parties believed a special warranty sufficient to carry a good title, and that defendant was advised to that effect by his attorney, Mr. Gallagher; that lately a bill has been filed by the state to foreclose this stock mortgage, and that the same is now pending in the chancery court, and if the claim of the state is sustained she will obtain a decree against the lands for a sum largely in excess of their value.

Prayers for injunction and for special and general relief.

John M. Moore, for plaintiff.

Martin & Martin, for defendant.

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CALDWELL, *District Judge*.—It is not alleged that the plaintiff was guilty of any fraud, wilful misrepresentation or concealment, or that the parties made any other or different contract than that disclosed by the face of the deed. Nor is it alleged that the plaintiff had any other or better sources of information than the defendant, either as to the fact or the law relating to the question as to whether the stock mortgage was or not a lien on the lands. It remained on the public records unsatisfied. The defendant knew this. He knew all that could be learned about the facts of the transaction by consulting those cognizant of them, and he knew all about the law applicable to the matter that could be known by consulting learned and able counsel, upon whose advice he acted in receiving a deed without covenants of warranty.

It is not alleged that the plaintiff expressed any opinion on the question based or claimed to be based on his personal knowledge, or that the expression of his belief founded on information, the sources of which were equally open to defendant, was the inducement to the purchase. He was a citizen of another state; he acquired the lands, not by a purchase from free choice at private sale as an investment, but at judicial sale, when he was compelled to purchase for better or for worse to save a debt. He acquired the lands without warranty, and it is clear from the averments in the cross-bill that it was his purpose to convey them as they came to him; to sell whatever he acquired by his purchase at the marshal's sale and no more; and to enter into no covenant that would render him liable beyond that. He seemed to realize the hazard of relying on the uncertain and fading recollections of men to overcome a solemn written record, and he knew that with the lapse of every year this hazard would be increased, and he probably also recognized the fact that the law is not one of the exact sciences, and that the most learned counsel, as well as courts, sometimes err; and, having no personal knowledge on the subject, he prudently

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declined to covenant against this incumbrance apparent upon the public records, although it was stale with age and was reported to be paid. The defendant, possessed of a more sanguine temperament and less caution, or having more faith in the memories of men and the advice of his counsel, chose to take the risk.

It is not alleged the stock mortgage is a lien upon the land. Indeed, it is in effect said that it is paid, but that, nevertheless, it is possible the state will have a decree, and that in that event the loss should fall on the plaintiff, because it would then be a case of mutual mistake. Mutual mistake about what? Not about the terms of the contract, for that is in writing, and is conceded to express the agreement of the parties. Not about the existence of the stock mortgage, for that was well known to both parties. If the parties were mutually mistaken about anything, it was as to whether or not the state could enforce the stock mortgage. It was precisely because the plaintiff recognized that the information which he, in common with the defendant, possessed on that subject might be erroneous, that he declined to warrant against incumbrances. If it shall turn out that the parties were mutually mistaken on this point, it is a mutual mistake about a matter which in its very nature possessed elements of uncertainty; and which party should take the risk and bear the loss, in the event of a mutual mistake on the point, was made a matter of convention between the parties, and found expression in the terms of the deed. The mutual mistakes against which equity relieves relate to something not within the contemplation of the parties in making their contract, and therefore not covered, nor intended to be covered, by it.

All the cases cited by the learned counsel for the defendant have been examined. In all of them where the facts are given there was the element of misrepresentation or fraudulent concealment of a material fact, or a mistake consisting in an unconsciousness, ignorance or forgetfulness of a

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material fact. All of these elements are wanting in this case.

"It is well settled that to set aside a contract on the ground of misrepresentation it must be of something material, constituting some motive to the contract, something in regard to which some reliance is placed by one party on the other, and by which he was actually misled; not a matter of opinion merely, equally open to the inquiry and examination of both parties." *Smith v. Richards*, 13 Pet. 26; *Hill v. Bush*, 19 Ark. 522.

In *Raymond v. Raymond*, 10 Cush. 134, the court say the grantee "took a deed with covenants of a very limited character, and having thus taken certain express covenants of his vendor, he must be restricted to them, and cannot ingraft upon them the more extended engagement found in a verbal promise made at the time of the execution of the deed. A deed with a special warranty against all persons claiming by, through or under the grantor cannot thus be extended to a general covenant of warranty against all persons." And the rule is that a party has no remedy on the ground of a mere failure of title, if he has taken no covenants to secure the title, and there is no fraud in the case. *Chesterman v. Gardner*, 5 Johns. Ch. 29; *Gouverneur v. Elmendorf*, id. 79.

There is a plea of the statute of limitations to one of the notes given for the purchase money. More than five and less than seven years elapsed between the maturity of the note and the institution of this suit. The plea is not good in bar of a decree *in rem* for a sale of the lands. *Hall v. Denkla*, 28 Ark. 507; *Birnie v. Main*, 29 Ark. 591. But it is a bar to the recovery of a personal judgment against the defendant.

In the course of the opinion in *Birnie v. Main*, *supra*, there is an expression from which it might be inferred that the court held the law on the last point to be otherwise. Such a doctrine is so obviously unsound and so clearly against

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all authority that we must suppose that, if the expression referred to is susceptible of such a construction, it is the result of inadvertence or clerical misprision, and does not express the deliberate judgment of the court.

The demurrer to the cross-bill and the exceptions to the answer, except so much thereof as pleads the statute of limitations in bar of a personal judgment on one note, are sustained.

WALLERTON v. SNOW and others.

(District of Kansas. November, 1882.)

1. **EQUITY — PRE-EMPTION — GOVERNMENT PATENTS.**—By joint resolution of April 10, 1869, congress provided that a *bona fide* settler upon certain lands known as the "Osage ceded lands," in Kansas, should have a right to purchase on certain terms. The defendant Snow was such a settler, and, having the right to purchase under said joint resolution, he made the requisite proof and tender of the purchase money to complete such purchase. *Held*, that he was entitled to a patent from government, and has an equity in the land and improvements thereon which he is at liberty to sell and convey.
2. **SAME — LOCAL LAND OFFICER.**—The refusal of a local land officer to receive the purchase money, on the ground that it was too late to give notice to others who were supposed to have an adverse claim, will not defeat such settler's rights.
3. **SAME — RIGHTS OF SUBSEQUENT PURCHASERS.**—Where one holding an equitable title as above conveys that equity and gives up possession to another, who agrees to pay therefor when the grantor's equity shall have ripened into a legal title, such purchaser will not be allowed to make use of the possession so obtained to perfect a title in himself, and thus release himself from his liability to the party whose equity he has so purchased; and subsequent purchasers of land so acquired take whatever rights they have in the land, subject to the rights of the party in whom the equity thereto was first vested.

In equity. On demurrer to bill.

The material allegations of the bill are, in substance, as follows:

- (1) On the twenty-ninth day of August, 1876, one Stephen

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Hardin filed his declaratory statement in the proper local land office for pre-emption upon the quarter sections of land now in controversy, and on the twenty-second of December following he made proof and payment, under the act of congress of August 11, 1876 (19 St. 127), and obtained the usual certificate and receipt.

(2) Subsequently, on the first day of June, 1877, the said Hardin and his wife, being then in possession of the land, executed to complainant a mortgage to secure the sum of \$1,000.

(3) Default having been made on the payment of said debt, suit was brought to foreclose the same, to which suit defendant Snow was made a party, but as to him the suit was dismissed, and decree of foreclosure, with the usual order of sale, was taken against the other defendants. At the sale under said decree the land was purchased by one Noble for complainant, to whom he subsequently made conveyance; but when possession under the master's deed was demanded, it was refused, the said Hardin having yielded possession to one Sherrill, who claimed to hold under defendant Snow.

(4) At the time of the foreclosure suit, the defendant Snow held a patent from the United States for the land in controversy. The complainant claims, however, that this patent was obtained in violation of his rights and against good conscience, and he seeks a decree that it be held in trust for him.

(5) The facts with respect to Snow's title are as follows, as appears by the bill: The land in controversy is a part of what is known as the "Oage ceded lands," in Kansas. By joint resolution of April 10, 1869, congress provided that any *bona fide* settlers upon any of said lands should have the right to purchase on certain terms; and Snow was such a settler, having entered upon the land and bought the improvements belonging to an earlier settler in 1870. Having the right to purchase under said joint resolution, Snow made

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the requisite proof, and tendered the purchase money to complete such purchase; but the local land officers refused to execute to him the proper receipt and certificate, for what reason does not appear by the bill, but it is said in argument that it was because there was not time in which to notify certain railroad companies then supposed to have some adverse interest in the land. Snow continued to occupy the premises until 1875, when he made a conditional sale of the same to one Samuel Sherrill for \$1,150, giving bond for a deed when his title should be perfected, and Sherrill should pay the purchase price, represented by four promissory notes due at different dates, only one of which has been paid. In pursuance of this contract, Snow yielded possession to Sherrill, who, on the seventh of April, 1875, sold and conveyed such equities as he had to Hardin. Having thus obtained possession, Hardin proceeded, as above stated, to obtain title under the act of 1876, which, like the joint resolution of 1869, authorized sales of said lands under certain terms and conditions to *bona fide* settlers. The right of Hardin to purchase was contested by Snow, and, as a result of that contest, Hardin's entry was set aside and Snow was allowed to make proof of entry as of his first settlement, and thereupon he completed his entry and received his patent.

Rossington, Johnston & Smith, for complainant.

Hutchings & Denison and *L. Stillwell*, for defendants.

McCrary, *Circuit Judge*.—Snow was, prior to his sale to Sherrill, in possession of the land, owning valuable improvements thereon, and having done all that the law required to enable him to obtain the title. He had made the necessary proof and tendered the purchase money as required by the joint resolution of congress of April 10, 1869. He was undoubtedly a *bona fide* settler, and had an equity in the land. The adverse decision of the local land officers was clearly not

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fatal to the claim. It could be attacked in the courts or before the land department of the government in a new proceeding to test his rights. *Harkness v. Underhill*, 1 Black, 319, and cases cited. And even if conclusive of his rights under the joint resolution of 1869, it would not have deprived him of the benefit of other laws intended for the protection of *bona fide* settlers upon the public lands. This adverse ruling was, however, set aside by a later ruling of the commissioner of the general land office and the secretary of the interior, by which a patent was awarded to Snow. That this last action of the land department was in accordance with the law, as between the United States and Snow, is, we think, entirely clear. The ruling of the local land officers rejecting Snow's application to purchase, on the ground that it was then too late to give notice to certain railroad companies who were supposed to have an adverse interest, cannot be upheld upon any sound construction of the joint resolution of 1869; and unless, prior to the order granting a patent to Snow, Hardin had acquired a vested right in the lands which entitled him to a patent, the complainant cannot recover. We are, therefore, to consider whether Hardin acquired such a vested right in the *interim* between the rejection by the local officers of Snow's application to purchase, and the decision of the department at Washington awarding him the patent. It appears that while yet in possession, owning the improvements and possessing the equities to which we have referred, Snow made a conditional sale of the premises to one Samuel Sherrill for \$4,150, giving him a bond for a deed to be executed when Snow should complete his title to the land, and Sherrill should pay the purchase money, which he was to do in instalments due January 1, 1876, January 1, 1877, January 1, 1878, and January 1, 1879, with interest. The bond was to be void if the notes were not paid. Only the first instalment has been paid.

The court is of the opinion, independently of all other

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questions in this case, that Snow had an equity in the land and improvements which he was at liberty to sell and convey to Sherrill, and that he was at liberty to secure the purchase money by the execution of a bond for a deed. This contract was perfectly valid as between Snow and Sherrill, and all other persons chargeable with actual or constructive notice of the rights of Snow under it. It is not alleged in the bill that Hardin, under whom, through a mortgage foreclosure, the complainant claims, was without notice of the rights of Snow under the bond above named. On the contrary, it is averred that Hardin, before attempting to procure a patent, purchased the claim and improvements from Sherrill, and notice of the contract between Sherrill and Snow is *impliedly* admitted by the allegation of the bill that "on the twenty-third day of January, 1875, the said Snow entered into a contract with the said Sherrill, whereby the said Sherrill became seized and possessed of said premises and the improvements thereon." Besides, if it be true, as stated by counsel in argument, that Sherrill conveyed to Hardin by quitclaim deed, then it follows that the latter cannot be regarded as a *bona fide* purchaser without notice. *May v. LeClaire*, 11 Wall. 217.

We conclude, therefore, that Hardin acquired whatever rights he had in the land, subject to the rights of Snow, under the bond executed by him to Sherrill. He simply took the place of Sherrill, and it required no argument to show that if Sherrill, instead of selling to Hardin, had gone on and applied for a patent under the act of 1876, whatever title he might have acquired would have been held by him subject to his liability to Snow. Snow had an equity in the land for which Sherrill agreed to pay him a given sum as soon as the equity should ripen into a legal title. By virtue of the contract between them, Sherrill obtained possession from Snow. It would be grossly inequitable to permit him to use that possession to perfect title in himself, and thus release himself from liability to Snow. No court of equity

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would listen to such a claim. This is upon the assumption that Sherrill could have perfected title under the act of 1876, as Hardin claims to have done. But this we do not decide. We only say that if Sherrill had by a contract of purchase acquired Snow's equities in deeding his possession and his valuable improvements, and had then attempted to abandon the contract of purchase, ignoring his liability under it, and to acquire the title under the act of 1876, we should hold Snow's claim for purchase money good against the land in Sherrill's hands, even if he had obtained a patent in his own name under that act. In such a case he would have used the possession and other equities acquired from Snow to perfect his title, and he would have obtained for his own use the valuable improvements of the latter. It follows that, even in the most favorable view of the law for complainant, we must hold that Hardin took any interest he has in the land subject to the claim of Snow under the bond. The complainant took a mortgage upon the land from Hardin to secure a debt. Hardin had at best but an equity, and his mortgagor is, therefore, not entitled to the protection extended by courts of equity to *bona fide* purchasers without notice. This doctrine applies only to the purchaser of the legal title. Story, Eq. Jur. § 1502; *Vuttier v. Hinds*, 7 Pet. 252; *Butler v. Douglass*, 1 McCrary, 630.

The conclusion is that Hardin acquired at the most only a right to the land after paying the balance due from Sherrill to Snow, and that the complainant stands in Hardin's shoes and can perfect his title, if at all, only upon the same condition. This conclusion accords with our sense of justice and equity, since a contrary ruling would involve the injustice of depriving Snow of his possession, his improvements, his right to purchase at the minimum price, and all his equities and rights, without exacting that he shall be paid for them the sum agreed upon between him and Sherrill, to whom he sold and conveyed them upon the condition that payment be made. As complainant has not tendered pay-

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ment of the sum due defendant Snow upon the bond and notes for the purchase money, the bill is, in our view, bad, and the demurrer must be sustained upon this ground, without considering the other important and perhaps doubtful questions argued by counsel.

HENRY and another v. GOLD PARK MINING Co.

(District of Colorado. March, 1883.)

1. GARNISHMENT.—A judgment of a federal court is not attachable under process issued out of a state court.

One John W. Bailey sued the plaintiff Henry in one of the courts of the state of Colorado, and, having caused a writ of attachment to issue, served process of garnishment upon the defendant, the Gold Park Mining Company. The garnishee answered, admitting that it is indebted to plaintiff Henry in the sum of \$4,942.47 on a judgment against him in this court, in this cause, and thereupon moved this court to stay execution upon the judgment until the matter of its liability in the state court can be determined. This is the motion now to be considered.

Wells, Smith & Macon, for the motion.

Samuel T. Rose and Chas. J. Hughes, contra.

MCCRARY, *Circuit Judge*.—The only question which I deem it necessary to consider is whether a debtor by judgment in a federal court can be subjected to garnishment at the suit of a creditor who proceeds against him in a state court. Whatever the rule may be with respect to the garnishment of a judgment debtor in the same court in which the judgment was rendered, I am of the opinion that it would lead to great inconvenience and to serious conflicts of juris-

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diction to hold that a judgment in one court may be attached by garnishment in another, especially where the two courts are of different jurisdiction, as in the case before us, and the decided weight of authority sustains this view. *Drake*, Attachm. § 625; *Young v. Young*, 2 Hill (S. C.), 426; *Burrill v. Letson*, 2 Speers, 378; *Wallace v. McConnell*, 13 Pet. 136; *Wood v. Lake*, 18 Wis. 94; *Thomas v. Wooldridge*, 2 Woods, 667 (opinion by Mr. Justice Bradley); *Franklin v. Ward*, 3 Mason, 146; *Freeman*, Ex'ns, § 166.

Upon these authorities, as well as upon what I conceive to be much better reason, I am constrained to hold that a judgment in this court cannot be attached in a proceeding in a state court, and this ruling is conclusive of the motion to stay execution, which, without considering the other questions raised, must be overruled. Ordered accordingly.

UNION NATIONAL BANK OF CHICAGO, ILLINOIS, v. CARR and others.

(*Southern District of Iowa, Central Division. 1883.*)

1. **OPTION CONTRACTS — VALIDITY OF.**— Option contracts are not necessarily illegal, and the incident of putting up margins amounts to nothing unless the contract itself is illegal. The validity of such contracts depends upon the mutual intention of the parties as to the actual sale and delivery of the property, or a pretended and fictitious sale, to be settled upon differences.

On exceptions to master's report.

LOVE, *District Judge*.— There seems to be no serious question made in this case, except that of the legality of the contracts, which lie at the basis of the controversy. It is insisted that the contracts in question were illegal because they were "option" contracts, and because the defendant was charged with certain losses, by reason of his failure to put up "mar-

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gins," etc. The evidence, however, falls far short of what is necessary to establish illegality in contracts of this kind. All "option" contracts are not illegal, and the incident of putting up margins amounts to nothing, unless the contract itself is illegal. The validity of "option" contracts depends upon the mutual intentions of the parties. If it be not their intention in making the contract that any property shall be delivered or paid for, but that the pretended and fictitious sale shall be settled upon differences, the agreement amounts to a mere gambling upon the fluctuations of prices, and the contract is utterly void. But if it is the *bona fide* intention of the seller to deliver or the buyer to pay, and the option consists merely in the time of delivery within a given time, the contract is valid.

If the contract itself is lawful, the putting up of margins to cover losses which may accrue from the fluctuation of prices, and the final settlement of the transaction according to the usages and rules of the board of trade, are entirely legitimate and proper.

Nothing whatever appears in the present case to impeach the validity of the transactions in question, except that the defendant was dealing in options through his broker on the board of trade; that he failed to put up required margins; and that his transactions were settled at heavy losses, which were charged to him. This is entirely insufficient to invalidate the charges made in the account against him.

The exceptions to the master's report will be overruled and a decree entered for the complainant.

There is, at least, serious doubt whether a decree can be entered till the next term. Let the cause, therefore, stand over till that time.

Lehman & Park, for complainant.

E. J. Goode, for defendant.

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GRIBBLE v. PIONEER PRESS CO.

(District of Minnesota. February, 1883.)

1. **REMOVAL OF CAUSE — CITIZENSHIP.**— Where there is reason to doubt the existence of jurisdictional facts, the parties may be examined upon the question, and the court may direct the proper pleadings to be filed to raise the issues involved in such question.
2. **SAME — REMAND.**— Where both plaintiff and defendant are citizens of the state where suit is brought this court has no jurisdiction, and the cause will be remanded.
3. **ALIEN — NATURALIZATION.**— An alien naturalized under the laws of the United States is a citizen of the state in which he resides.

This cause was removed from the district court of Ramsey county by the defendant, upon the ground that it was at the time of the commencement of the action a citizen of the state of Minnesota and the plaintiff an alien. The plaintiff filed a plea to the jurisdiction of the court, alleging that at said time he was a citizen of the same state with the defendant.

A jury trial was waived, and the issue raised by the plea was brought to trial before the court. The plaintiff testified that he was about sixty years old; that he was born in Devonshire county, England; that his father was Joseph Gribble, an Englishman, who immigrated into the country, bringing plaintiff with him, when he was about nine years old; that he knew of his father's voting in the state where they then resided before he, witness, was seventeen years old; that he had himself voted in different states, and ever since he was twenty-one years old; that he had pre-empted public land of the United States, using therefor as proof of citizenship the original naturalization papers of his father.

The plaintiff offered in evidence a duplicate of the naturalization papers of his father, which are in the words and figures following:

"Commonwealth of Pennsylvania, Allegheny County:

"Be it remembered that at a court of quarter sessions, held at the city of Pittsburgh, in and for the county of Al-

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leggheny, in the commonwealth of Pennsylvania, in the United States of America, on the second day of October, A. D. 1838, Joseph Gribble, a native of England, exhibited a petition to be admitted to become a citizen of the United States. And it appearing to the satisfaction of the court that he has resided within the limits and under the jurisdiction of the United States for five years immediately preceding his application, and that during that time he has behaved as a man of good moral character, attached to the principles of the constitution of the United States, and well disposed to the good order and happiness of the same, and that he has in all things fully complied with the laws of the United States in such case made and provided, and having declared on his solemn oath before the said court that he would support the constitution of the United States, and that he did absolutely and entirely renounce and abjure all allegiance and fidelity to every foreign prince, potentate, state or sovereignty whatever, and particularly to the queen of Great Britain, of whom he was before a subject; whereupon the court admitted the said Joseph Gribble to become a citizen of the United States, and ordered all the proceedings aforesaid to be recorded by the clerk of said court, which was done accordingly.

“In testimony whereof I have hereunto set my hand and affixed the seal of the said court at the city of Pittsburgh, this second day of October, *Anno Domini* 1838, and of the sovereignty and independence of the United States of America the sixty-third.

[Original Seal of Court.]

“T. L. McMILLAN, Clerk.

“Duplicate of original issued by me this fourteenth day of September, A. D. 1832.

A. H. ROWARD, Jr., Clerk.”

No further testimony was offered by either party, and the matter was submitted.

John B. Brisbin, for plaintiff.

W. D. Cornish and *C. D. O'Brien*, for defendant.

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NELSON, *District Judge*.—The evidence under the plea is satisfactory, and sufficient to show that the plaintiff is by virtue of law a citizen of the United States and of the state of Minnesota.

Objection is made to the admissibility of the certificate of naturalization of the plaintiff's father offered in evidence. The evidence of the plaintiff alone, uncontradicted, without this authenticated record, is sufficient to authorize the court, under the act of congress of March, 1875, to dismiss or remand the case, but in my opinion the certified copy is admissible. The act of congress (R. S. § 905, p. 171) providing for the mode of authenticating records of state courts is not exclusive, and states can adopt any other method. In the state of Minnesota it is enacted that "the records and judicial proceedings of any court of any state or territory of the United States shall be admissible in evidence in all cases in this state when authenticated by the attestation of the clerk . . . having charge of the records of such court, with the seal of such court annexed." Young's St. (Minn.) § 54, p. 800. The document offered meets the requirements of this statute and is admissible in evidence.

It is without doubt the right and duty of the court to remand a case removed from a state court if it ascertains in any way that it was not removable under the law. This court cannot be obliged to proceed with the trial of a cause with the knowledge that it is in fact not within its jurisdiction, and that either party may at any moment, by raising the question of jurisdiction on the record, put an end to the proceedings. If it were otherwise, the parties to such an action might, by suppressing the facts with respect to citizenship, require the court to proceed until they have discovered its views of the law, and then, if not satisfied, might interpose a motion to dismiss or remand. See 104 U. S. 209. The court cannot permit any practice which will make possible such an experiment. If the judge has reason to doubt the existence of the jurisdictional facts, he has a perfect

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right to examine the parties upon that question, or to direct a plea in abatement to be filed and heard in order to settle *at the outset* that question.

The proof in this case shows that the plaintiff was the son of a person who was duly naturalized under the laws of the United States, and a minor dwelling therein at the time of the naturalization of his father. He thus became, by virtue of law, a citizen. R. S. § 2172, p. 380.

The plaintiff and defendant being citizens of the state of Minnesota, this court has no jurisdiction of the cause removed. Judgment on the plea will be entered in favor of the plaintiff, and in furtherance of justice it is remanded to the Ramsey county district court, with costs to be paid by the defendant.

UNITED STATES *ex rel.* HARSHMAN *v.* COUNTY COURT OF KNOX
COUNTY.

(*Eastern District of Missouri. March, 1883.*)

1. MUNICIPAL BONDS — RECITALS THEREIN — MANDAMUS.— Suit was brought upon certain county bonds which recited upon their face that they had been issued under the provisions of the charter of a railroad company. The petition stated that they had been issued under the provisions of the General Statutes of the state. The bonds were duly filed in the case, and judgment was obtained by default. *Mandamus* proceedings were thereupon instituted to enforce the judgment, and an alternative writ was issued commanding the county court to levy a special tax *sufficient to pay it*. Under the laws of the state it was the duty of the county court to levy such a tax, where the bonds were issued as alleged in the petition, but they could only levy a tax of one-twentieth of one per cent. per annum, where they were issued as recited in said bonds. The return to the writ stated that the bonds had been issued under the charter of the railroad company, and that the lawful taxes had been levied. Upon motion to quash the return, *held*, that the bonds were a part of the record for the purpose of determining the measure of taxation to be enforced, and that the presumption was that the recitals therein

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were true, in the absence of evidence that such recitals were the result of mistake or inadvertence.

2. **SAME — POWER OF FEDERAL COURTS OVER STATE OFFICERS.**—In such proceedings federal courts can only require state officers to enforce state laws.

Motion to quash return to alternative writ of *mandamus*.

The relator obtained judgment by default against Knox county, upon certain bonds issued by the county, to aid in the construction of the Missouri & Mississippi Railroad. It was averred in the petition in this suit upon said bonds that they were issued under certain provisions of the General Statutes of Missouri, in pursuance of a vote of the people. On the face of the bonds themselves, it is recited that they were issued under and in pursuance of the provisions of the charter of the Missouri & Mississippi Railroad Company. For the payment of a judgment rendered upon bonds issued under the former law, it is the duty of the county court to levy a sufficient tax; but for the payment of bonds issued under the latter, only one-twentieth of one per cent. per annum is authorized. The alternative writ directs the levy of a special tax sufficient to pay the judgment, and proceeds upon the theory that the record in the suit upon the bonds conclusively shows that they were issued under the General Statutes. The return avers that they were issued under the charter of the company, and states that the taxes authorized thereby have been levied. The question is as to the sufficiency of this return.

T. R. Skinker, for relator.

James Carr and *George D. Reynolds*, for respondent.

McCRARY, Circuit Judge.—The decision of this motion depends upon the effect to be given to the adjudication in the original suit. In the petition it was averred that the bonds were issued under the general law and in pursuance of a vote of the people. Upon the face of the bonds sued

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on it is declared that they were issued under and in pursuance of the provisions of the charter of the Missouri & Mississippi Railroad Company. The judgment was by default. Are we to take the allegations of the petition as to the authority under which the bonds were issued as established beyond dispute for the purposes of this proceeding, or can we look to the contracts sued upon? It is well settled that the judgment in the original suit settles all questions as to the validity of the bonds, and conclusively determines that they were binding obligations of the county duly created by authority of law, and as such entitled to payment out of any fund that can lawfully be raised for that purpose. We are also satisfied that where the plaintiff's petition in the suit and the bonds sued on agree in stating that they were issued under a given statute, and this is not denied by any pleading in this suit, or if denied is found for the plaintiff, it will be too late in a *mandamus* proceeding brought to enforce the judgment to raise the question. But here there was a variance between the allegations of the petition and the recitals in the bonds sued on. The plaintiff was bound by both, unless he was prepared to aver and prove that the recitals in the bonds were written there by mistake, and that the power to issue them was in fact derived, not from the act named, but from some other. Ordinarily, a judgment by default is conclusive of the truth of all the material allegations of the petition, the establishment of which was necessary to entitle the plaintiff to the judgment rendered; but it often happens that, for the purpose of determining what property is liable to be taken for the satisfaction of a judgment, it is necessary to look behind the judgment and into the contract upon which it was rendered.

Questions of exemption are often determined by reference to the nature of the contract, or its date. As, for example, where it is sought to enforce a judgment against property claimed as a homestead, it may often be necessary to go back to the contract and ascertain whether it was executed

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before the debtor acquired the homestead, or whether it was a debt for which the homestead was liable, or whether the homestead right has been released. And so, in a case like the present, we must, in order to determine what remedies to apply, and what measure of taxation to enforce, look into the contract upon which the judgment was rendered. The county, when sued upon its bonds, has a right to assume that any judgment rendered will be enforced according to the law which entered into and is a part of the contract. And when *mandamus* proceedings are instituted for the enforcement of such a judgment, the respondents may properly raise the question as to what taxes are authorized to be levied and collected for its payment. And for the purpose of determining this question the court must go back to the contract expressed in the bonds upon which the judgment was rendered. In *Ralls Co. v. U. S.* 105 U. S. 733, the supreme court say:

“While the coupons are merged in the judgment, they carried with them into the judgment all the remedies which in law formed a part of their contract obligations, and these remedies may still be enforced in all appropriate ways, notwithstanding the change in the form of the debt.”

If the remedies given by the original contract are to be enforced after the judgment, it follows, of course, that in order to know what those remedies are, and to enforce them, we must know what the contract was. And what is the best evidence of the terms of the contract? Manifestly the contract itself, if we are permitted to look at it. But it is contended that the bonds sued on in the original suit, though filed with the clerk in accordance with the statute regulating the practice in such cases, and pursuant to a rule of this court, are no part of the record and cannot there be considered. Whatever the general rule upon this subject may be, we are of the opinion that in a case such as the present, and for the purpose of ascertaining what remedy to apply or enforce, we are at liberty to look into the terms of the con-

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tract upon which the relator's judgment was rendered, and if there is a variance between the contract and the allegations of the petition, we will presume in favor of the contract until it is shown that the recitals therein were the result of mistake or inadvertence. It is only necessary to hold that the instrument sued on and filed with the clerk in accordance with the statute and the rule of the court are a part of the record, for the purpose of determining, in a case such as the present, what measure of taxation to enforce against the municipal corporation for the satisfaction of the judgment. This is all that is now decided. Were we to hold otherwise, we might be called upon to command the officers of the county to levy taxes not authorized by law, for the fulfilment of their contracts; or, in other words, to violate their duty and exceed their powers. And it is now well settled that a federal court can only require of such officials obedience to the law, and cannot make a law for them. Motion to quash overruled.

TREAT, *District Judge*, concurs.

COBB v. PRELL.

(*District of Kansas. January, 1883.*)

1. OPTION CONTRACTS — INTENTION OF PARTIES.— When it is the intention of the parties to contracts for the sale of commodities, that there shall be no delivery thereof, but that the transactions shall be adjusted and settled by the payment of differences, such contracts are void.
2. SAME — BURDEN OF PROOF.— It is the duty of the courts to scrutinize very closely contracts for future delivery; and if the circumstances are such as to throw doubt upon the question of the intention of the parties, it is not too much to require a party claiming rights under such a contract to show affirmatively that it was made with actual view to the delivery and receipt of the commodity.
3. SAME — CONTRACTS HELD VOID.— As the evidence in this case establishes the fact that the parties did not intend the actual delivery of

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the corn contracted for, but did intend to speculate upon the future market and to settle the profit or loss of defendant upon the basis of the prices of grain on the thirty-first of May, 1881, as compared with the prices at which defendant contracted to sell, the contracts sued upon are void, and plaintiff cannot recover.

At law.

McCREARY, *Circuit Judge*.—In this case a jury was waived and the cause was tried by the court. It is an action at law in which the plaintiff claims damages for breach of contract. The complaint alleges that during the months of February, March and April, 1881, the defendant, who is a grain dealer residing at Columbus, Kansas, authorized the plaintiff, who is a commission merchant at St. Louis, Missouri, to sell for him certain quantities of corn to be delivered to the party or parties to whom the plaintiff might sell the same, at the option of defendant, during the month of May, 1881. The complaint further alleges that the plaintiff contracted for the sale of said corn to be delivered during said month of May; but that defendant, failing to deliver said corn, the plaintiff having contracted to sell the same in his own name, was obliged to and did pay the damages resulting from such failure, to wit: the difference between the price of corn at the place of delivery on the thirty-first day of May and the price at which defendant had agreed to sell and deliver the same, amounting in the aggregate to \$2,945.25, for which, with interest, he prays judgment.

The answer alleges that the contracts set out in the complaint were option or marginal contracts, and that said plaintiff well knew them to be such, and so made the contracts of sale of said corn, not expecting to receive of the defendant any portion of the amounts of corn for delivery, but expecting to pay any losses or receive any gains that might accrue for or against said defendant; that said contracts were made for the purpose of speculating on the rise and fall of prices, the plaintiff to receive commissions for

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said transactions; and that said contracts were mere wagers on the fluctuating of the prices of grain in the market of the city of St. Louis.

The case therefore turns upon the question whether or not it was the intention of the parties that the corn should be delivered. If such was the *bona fide* intention, then the plaintiff is entitled to recover; but if, on the other hand, it was understood that the defendant was not required to deliver the corn, and that the transactions should be adjusted and settled by the payment of differences, then the contracts were void and the plaintiff cannot recover. Upon this controlling element in the case, as might reasonably be expected, the testimony of the plaintiff and defendant is in conflict. Under such circumstances we are obliged to determine the controversy by reference to the actions of the parties in connection with the transactions and their contemporaneous declarations, especially those in writing, having a bearing upon the subject. If we can learn from these what interpretation the parties themselves have put upon their own contract, we shall find a satisfactory guide in determining the case.

The evidence satisfactorily shows that the plaintiff was largely engaged at and about the time of these transactions in dealing in options. He was also largely engaged in buying and selling grain for actual delivery. It appears that he adopted and had in use two blank forms upon which statements of account were rendered to his dealers, one of which was used when the grain was actually delivered, and the other when it was not delivered, and the settlement was made upon the basis of the differences. In the former statement, as might be expected, we find charges for freight, inspection, insurance, weighing, storage and commissions. These are charges which necessarily entered into the transaction where the grain was shipped and delivered. In the latter statements these items do not appear. They show only the number of bushels of grain bought, the price at

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which bought, and the month of delivery; the price at which the same was sold, and the net loss or gain. There are in evidence thirty-four of these last-named bills, used in the settlement of option deals between June 26, 1881, and July 30, 1881, all representing transactions between plaintiff and defendant. Of the bills representing actual sales from the defendant to plaintiff between September 18, 1880, and April 19, 1881, there are fifty-seven; so that it appears that the course of dealing between the plaintiff and defendant was such that sometimes the grain contracted for was to be delivered, and at other times it was not to be delivered, and the transactions were to be settled upon the basis of margins. It only remains to be determined whether the transactions in controversy belong to the former or to the latter class. If the question were to be determined upon the testimony of the parties themselves, conflicting as it is, in connection with the facts already stated, it would probably depend upon the question: upon which party rests the burden of proof? And I am inclined to the opinion that, without reference to other evidence, the plaintiff would fail.

It is the duty of the courts to scrutinize very closely these time contracts, and if the circumstances are such as to throw doubt upon the question of the intention of the parties, it is not too much to require a party claiming rights under such a contract to show affirmatively that it was made with actual view to delivery and receipt of the grain. *Barnard v. Backhaus*, 9 N. W. Rep. 595.

It appearing that the parties were in the habit of dealing in options, and the evidence being equally balanced upon the question whether these were option contracts or not, the court would be obliged, I think, to say that the plaintiff has failed to make out his case by a preponderance of evidence. But whether this be so or not, a reference to the written evidence, to be found in the correspondence of the parties at and near the time of the transaction, strongly corroborates the defendant. A number of letters, written about the time

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of these transactions, and evidently referring to them, are in evidence, and an examination of them will show that the plaintiff was constantly insisting, not upon the shipment of the quantity of corn purchased by him, but upon the payment of margins, either in cash or by the shipment of enough corn to cover margins. February 11th, plaintiff writes to defendant, referring to the transactions between the parties as "option deals." April 22d, he writes, "We had to put up over \$2,000 on your deals," etc. May 2d, he says, "You must ship us some corn as a margin." May 7th, he says, "If you can't ship us any corn to cover margins, please send us \$500." May 18th, he writes, "We draw \$500 on you. This is margins for your corn deals, which we hope you will pay. This will leave you about \$300 behind to make corn deals up to market." May 27th, he says, "We have written you and drawn on you for margins."

Perhaps the most significant letters bearing upon this question are those of May 30th and 31st, the dates on which the time for the delivery of the corn expired. If it was a *bona fide* transaction, and plaintiff was expecting the delivery of the corn, we should expect to hear him, in these letters, complaining or expressing surprise that the time was about expired and the corn had not been delivered. But, on the contrary, a reference to the letters of those dates will show that the only complaint was that defendant had not furnished the margins. Thus, on May 30th, plaintiff writes, "We cannot carry these deals when you not only refuse to give us margins, but seem to pay no attention to our demands." On the thirty-first plaintiff writes to explain the manner in which he had closed out the May corn, and expressing regret at the serious loss to the defendant, but says nothing to indicate that he expected the corn to be shipped. Upon all of the evidence, I am of the opinion, and therefore find the fact to be, that the parties did not intend the actual delivery of the corn contracted for, but did intend to speculate upon the future market, and to settle the profit or

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loss of the defendant upon the basis of the prices of the grain on the thirty-first of May, 1881, as compared with the price at which defendant contracted to sell. Such being the fact, the law is well settled that the plaintiff cannot recover. *Melchert v. Am. Un. Tel. Co.* 11 Fed. Rep. 193; *Gregory v. Wendell*, 39 Mich. 337; *Pickering v. Cease*, 79 Ill. 328; *Barnard v. Backhaus*, *supra*.

Judgment for defendant.

Everest & Waggener, for plaintiff.

J. R. Hallowell and *J. T. McCleverty*, for defendant.

NOTE.—There are perceptible differences between regular trade and speculation. These differences exist even though the speculation be, as much speculation always is, entirely lawful and legitimate. A regular trader is engaged in his business continuously. As remarked by Judge Barr recently, "It is the general course of a man's business which defines and classifies it." *Bryant v. W. U. T. Co.* U. S. Circuit Court, Kentucky, May 2, 1883. It is his means of making a livelihood or acquiring a competence. Education and experience familiarizes him with the operation of the law of supply and demand as to the commodity he buys and sells. He knows, with more or less accuracy, its worth and marketability. The profit he expects is the difference between its retail and wholesale prices. Or it may be the difference between the price of the commodity at the place where it is purchased and the price at the place to which it is carried for market and sold.

On the other hand, speculation, though it may be followed as a regular business, is oftener the taking advantage of opportunities to make money outside of one's regular employment. It is frequently a sort of commercial "bush-whacking." The speculator buys lands, stocks, grain, goods, or any other property, in expectation of a rise of price, and of selling so as to profit by the advance. Or he sells property for future delivery at an agreed price, with the expectation of buying enough of it to fill his contract at a lower price before the time comes for him to deliver. The latter is a most common form of speculation, especially in stocks and grain. A speculator comes to a commission firm and orders them to purchase a quantity of grain or stock for him; he does not pay for it, but simply deposits with the commission firm as a "margin" a proportion, say ten per cent. of the cash value of the grain or stock "bought" for him. The grain or stock is then purchased and held by the commission man, subject to the order of the

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speculator. If prices advance, he orders a sale at the advance and pockets the profits. If prices recede, the "margin" stands as security to protect the commission man, if he is compelled to sell at a loss. If prices go so low as to absorb the entire "margin," more "margins" are called for, and if the speculator fails to respond, he is "closed out;" that is, the commission man sells the grain or stocks at a loss and reimburses himself out of his customers' "margin." This business is simply gambling—gambling of the same sort as "three card monte" or "faro." It is more pernicious and demoralizing than either, for men and women will go upon a "stock exchange," "a board of trade," or into a "bucket shop," and put up their "margins" or bets upon the rise or fall of stocks that would never enter a "gambling hell" to bet upon the turn of a card.

As to the forms of contracts for the sale and future delivery of stocks, grain and other securities or commodities: 1st. They may be absolute in their terms; that is, they may fix absolutely and positively the amount of grain or whatever else is sold, the price charged for it and the time at which it is to be delivered. This is the ordinary and usual form of such a contract. But the time within which delivery is to be made may be a period of greater or less length. Usually, a month is the period stipulated for. The particular day of delivery is then optional with the seller. The contract may be said to be in one sense optional, meaning by this that it is optional with the seller upon what day of the month named he will deliver. This is the kind of option that is referred to by the phrases "seller the month" or at "seller's option." These terms mean that the seller has until the last day of the month in which to make delivery. The time of delivery may be any time within the month, at the option of the seller. Such an option as this is not illegal. It will not invalidate the contract. It is not an option that the seller may deliver or pay the difference between the contract price and the market price at the time of delivery. *Warren v. Hewitt*, 45 Ga. 501; *Pixley v. Boynton*, 79 Ill. 353.

A second form of contracts with reference to sale and future delivery is that known as a "put." The following is an example of a "put" in common use in New York:

"NEW YORK, — —, 18—.

"For value received, the bearers may deliver me — shares of the common stock of the — Railroad Company at — per cent. at any time in — days from date. The undersigned is entitled to all dividends or extra dividends declared during the time.

"Expires — —, —, at 1 $\frac{3}{4}$ P. M.

(Signed)

" — —."

The following is another form of a "put:"

"Received of E. F. \$30, in consideration of which we give him, or

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the holder of this contract, the privilege of delivering to us or not, prior to 3 o'clock P. M. of June 30, 1872, by notification or delivery, ten thousand bushels No. 2 oats, regular receipts, at forty-one cents per bushel, in store, and, if delivered, we agree to receive and pay for the same at the above price.

(Signed)

"CHANDLER, POMEROY & Co.,
"R. P. CHANDLER."

"Chicago, June, 1872."

In re Chandler, 13 Am. Law Reg. N. S. 310.

A "put," it is obvious, is a mere privilege. It is not an agreement to sell and deliver any property, nor to purchase and accept any. It is left entirely to the discretion of the owner of the privilege to deliver or not to deliver at any time during the period named. The signer agrees to take the property at the price named, if it is tendered to him within the time specified. Of course, whether it will be delivered to him or not depends upon the fluctuations of the market. If the market price goes below the price agreed upon in the privilege, then the owner of the privilege will buy at the lower market price and deliver at the higher price agreed upon in the "put." His profit will be the difference between the two prices. If, on the other hand, the market price rises above the price agreed upon in the privilege, then, obviously, the owner of the privilege to buy and "put" or deliver the commodity will not avail himself of it. He will prefer to lose the small consideration paid for the privilege rather than buy and deliver the property at a greater loss.

The converse of a "put" is a "call"—the third form of contract relative to the sale and future delivery of the subject of the sale. A usual form of call is thus:

"NEW YORK, — —, 1881.

"For value received, the bearer may call on me for — shares of the common stock of the — Railroad Company at — per cent. any time in — days from date. The bearer is entitled to all dividends or extra dividends declared during the time.

"Expires — —, 1881, at 1¼ P. M.

(Signed)

" — —."

The following is the form of contract known as a "straddle" or "spread eagle:"

"NEW YORK, — —, 1881.

"For value received, the bearer may call on the undersigned for — shares of the common stock of the — Railroad Company at — per cent. any time in — days from date. Or the bearer may, at his option, deliver the same to the undersigned at — per cent. any time within the period named. All dividends or extra dividends declared during the time are to go with the stock in either case; and this in-

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strument is to be surrendered upon the stock being either called or delivered.

"Expires — —, —, at 1¼ P. M.

(Signed)

"— —."

See Dos Passos on Stock Brokers, 117, 118.

"The word" (straddle), says Judge Finch, "if not elegant, is at least expressive. It means the double privilege of a 'put' and 'call,' and secures to the holder the right to demand of the seller, at a certain price within a certain time, a certain number of shares of specified stock, or to require him to take at the same price, within the same time, the same shares of stock. The continuance of the option is fixed by the agreement, and in this case was for sixty days. The value of a 'straddle,' it is proven, depends upon the fluctuations of the stock selected. The wider the range of these fluctuations, whether up or down, the greater the amount which may be realized; and of course the longer the option continues the greater the chance of such fluctuations during the period." *Harris v. Tumbridge*, 83 N. Y. 93.

Are these contracts legal? It is true that there have been some nice distinctions drawn concerning the right of a person to sell personal property not at the time owned by him, but which he intends to go into the market and buy—"that which he hath neither actually nor potentially," as it is said in some old cases. But as remarked by the supreme court of Michigan, "Courts must, however, from necessity, recognize the methods of conducting and carrying on business at the present day, and, applying well settled principles of the common law, enforce what might be called a new class or kind of agreements heretofore unknown, unless they violate some rule of public policy. The mercantile business of the present day could no longer be successfully carried on, if merchants and dealers were unable to purchase or sell that which as to them had no actual or potential existence. A dealer has a clear right to sell and agree to deliver at some future time that which he then has not, but expects to go into the market and buy. And it is equally clear that the parties may mutually agree that there need not be a present delivery of the goods, but that such delivery may take place at some other time; and that there need not be an actual manual possession given, but a symbolical one, as by the delivery of warehouse receipts according to custom, is also beyond dispute." *Gregory v. Wendell*, 39 Mich. 340. The principles affirming the legality of sales of property for future delivery are clearly and well established. *Wolcott v. Heath*, 78 Ill. 437; *Story v. Salomon*, 71 N. Y. 420; *Bigelow v. Benedict*, 70 id. 202; *Kirkpatrick v. Bonsall*, 72 Penn. St. 153; *Storey v. Salomon*, 6 Daly, 532; *Brua's Appeal*, 55 Penn. St. 294; *Grizewood v. Blane*, 11 C. B. 540; *Cassard v. Hinman*, 1 Bosw. 207; *Brown v. Speyers*, 20 Grat. 309; *Kingsbury v. Kirwan*, 43 N. Y. Superior Court, 451; 6 Cent.

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Law Jour. 228; *Pickering v. Cease*, 79 Ill. 330; *Barnard v. Backhaus*, 52 Wis. 593; *Porter v. Viets*, 1 Biss. 178; *Stanton v. Small*, 3 Sandf. 230; *McIlvaine v. Egerton*, 2 Robt. 422; *Harris v. Tumbridge*, 83 N. Y. 12; *Logan v. Brown*, 81 Ill. 419; *Corbett v. Underwood*, 83 id. 327; *Tyler v. Barrows*, 6 Robt. 104; *Hibblewhite v. McMorine*, 5 M. & W. 466; *Mortimer v. McCallan*, 6 id. 58; *Pixley v. Boynton*, 79 Ill. 353; *Shales v. Seignoret*, 1 Ld. Raym. 440.

But in order to be upheld by the courts, future delivery contracts must be made in good faith. If they are merely fictitious, if the parties have no intention of making an actual sale and delivery of the article dealt in, but intend to settle the contract, at its expiration, merely by paying the difference between the contract and the market prices, then it is a mere wager upon expected fluctuations in prices, and is illegal. All the cases concede and many expressly decide this point. See *Porter v. Viets*, 1 Biss. 177; *Pixley v. Boynton*, 79 Ill. 353; *Story v. Salomon*, 6 Daly, 531; *Kirkpatrick v. Bonsall*, 72 Penn. St. 158; *Wolcott v. Heath*, 78 Ill. 437; *Story v. Salomon*, 71 N. Y. 420; *Bigelow v. Benedict*, 70 id. 202; *Walls v. Bailey*, 49 id. 472; *Kingsbury v. Kirwan*, 43 N. Y. Superior Court, 451 (1878); 6 Cent. Law Jour. 228; *Barnard v. Backhaus*, 52 Wis. 593; *Rudolf v. Winters*, 7 Neb. 126; *Norton v. Blinn*, Sup. Ct. of Ohio (1883), 9 Cin. Law Bul. 263; *Harris v. Tumbridge*, 8 Abb. New Cas. 291; S. C. 83 N. Y. 92; *Sampson v. Shaw*, 101 Mass. 150; *Rourke v. Short*, 5 E. & B. 904; *In re Green*, 15 Nat. B. Reg. 205; *Hooker v. Knab*, 28 Wis. 511; *Steers v. Lashley*, 6 T. R. 61; *Brua's Appeal*, 55 Penn. St. 296; *Logan v. Brown*, 81 Ill. 419; *Corbett v. Underwood*, 83 id. 327; *Stanton v. Small*, 3 Sand. 230; *Tyler v. Barrows*, 6 Robt. 104; *Frost v. Clarkson*, 7 Cow. 24; *Gregory v. Wendell*, 39 Mich. 337; *Shales v. Seignoret*, 1 Ld. Raym. 440; *In re Chandler*, 18 Am. Law Reg. N. S. 810; S. C. *Ex parte Young*, 6 Biss. 53; *Hibblewhite v. McMorine*, 5 M. & W. 466; *Mortimer v. McCallum*, 6 id. 53; *Warren v. Hewitt*, 45 Ga. 508; *Grizewood v. Blane*, 11 C. B. 540; *Cassard v. Hinman*, 1 Bosw. 207; *Ruchizky v. De Haven*, 97 Penn. St. 202; *Petrie v. Hanay*, 3 T. R. 424; *Ashton v. Dakin*, 4 H. & N. 867; *Lehman v. Strassberger*, 2 Woods, 535; *Durant v. Burt*, 98 Mass. 167; *Owen v. Davis*, 1 Bailey, 315; *Armstrong v. Toler*, 11 Wheat. 274; *Brown v. Speyers*, 20 Grat. 309; *Yerkes v. Salomon*, 18 N. Y. Sup. Ct. 471; *Pickering v. Cease*, 79 Ill. 330; *Smith v. Thomas*, 97 Penn. St. 279; *Barnard v. Backhaus*, 52 Wis. 603.

The criterion is the intention of the parties. Do they intend an actual *bona fide* sale or a mere wager? If the former be intended the contract is legal; if the latter, it is illegal and void. This distinction is pointed out with great clearness and force by Mr. Justice Agnew of Pennsylvania, who says: "We must not confound gambling, whether it be in corporation stocks or merchandise, with what is commonly termed

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speculation. Merchants speculate upon the future prices of that in which they deal, and buy and sell accordingly. In other words they think of and weigh, that is, speculate upon the probabilities of the coming market, and act upon this lookout into the future in their business transactions; and in this they often exhibit high mental grasp and great knowledge of business, and of the affairs of the world. Their speculations display talent and forecast, but they act upon their conclusions and buy or sell in a *bona fide* way. Such speculation cannot be denounced. But when ventures are made upon the turn of prices alone, with no *bona fide* intent to deal in the article, but merely to risk the difference between the rise and fall of the price at a given time, the case is changed. The purpose then is not to deal in the article but to stake upon the rise or fall of its price. No money or capital is invested in the purchase, but so much only is required as will cover the difference — a margin, as it is figuratively termed. Then the bargain represents not a transfer of property but a mere stake or wager upon its future price. The difference requires the ownership of only a few hundreds or thousands of dollars, while the capital to complete an actual purchase or sale may be hundreds of thousands or millions. Hence, ventures upon prices invite men of small means to enter into transactions far beyond their capital, which they do not intend to fulfil, and thus the apparent business in the particular trade is inflated and unreal, and like a bubble needs only to be pricked to disappear, often carrying down the *bona fide* dealer in its collapse. Worse even than this, it tempts men of large capital to make bargains of stupendous proportions, and then to manipulate the market to produce the desired price. This, in the language of gambling speculations, is making a corner; that is to say, the article is so engrossed or manipulated as to make it scarce or plenty in the market, at the will of the gamblers, and then to place its price within their power. Such transactions are destructive of good morals and fair dealing and the best interests of the community. If the article be stocks, corporations are crushed and innocent stockholders are ruined to enable the gambler in its price to accomplish his ends. If it be merchandise, *e. g.*, grain, the poor are robbed and misery engendered;" per Agnew, J., in *Kirkpatrick v. Bonsall*, 72 Penn. St. 155.

It being the intention of the parties which characterizes the transaction (*Pixley v. Boynton*, 79 Ill., 333), the all-important question is: How may the intentions of the contracting parties be known? What are the evidences of their intentions? These are, first, the contract itself. As a general rule, a future delivery contract will be presumed to have been made in good faith. This is in accordance with the principle laid down by Lord Coke, "that whensoever the words of a deed, or of the parties without deed, may leave a double intentment, and

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the one standeth with law and right, and the other is wrongful and against law, the intendment that standeth with the law shall be taken." Co. Litt. 42, 188. But in Illinois "puts," "calls" and "straddles" have been made illegal and void by statute: "Whoever contracts to have or give to himself or another the option to sell or buy at a future time any grain or other commodity, stock of any railroad or other company, or gold, or forestalls the market by spreading false rumors to influence the price of commodities therein, or corners the market, or attempts to do so, in relation to any of such commodities, shall be fined not less than \$10 nor more than \$1,000, or confined in the county jail not exceeding one year, or both; and all contracts made in violation of this section shall be considered gambling contracts, and shall be void." R. S. Ill. (Cothran's ed. 1880, p. 471) ch. 33, sec. 130. Under such a statute, the contract itself is sufficient to establish its illegality. See *Pickering v. Cease*, 79 Ill. 328.

Some judges, in the absence of such a statute, have animadverted with great severity upon "puts," seeming inclined to hold them *prima facie* void. Judge Blodgett, speaking of the "put," in *Re Chandler*, *supra*, said: "It is, in substance, an assertion by the seller of the 'put' that oats cannot be purchased on that market before three o'clock P. M., of the thirtieth of June, for less than forty-one cents a bushel, and an undertaking to pay the difference between forty-one cents and any market price. If he, Chandler, sustains the price at forty-one cents or above, he wins the half cent a bushel paid for the 'put,' because the holder will not deliver, while if the price goes below that named, he is to pay the difference. This is practically the contract. It is as manifestly a bet upon the future price of grain as any which could be made upon the speed of a horse or the turn of a card."

"It is absurd," continues Judge Blodgett, "to suppose that they intended to deliver, unless they could do so for less than forty-one cents. They intended to deliver, if they could break Chandler, or prevent his 'corner' from culminating, as the jockey may *intend* to walk his own horse over the course after he has poisoned or lamed that of his competitor." But in the absence of a statute like that above, option contracts, including "puts," "calls" and "straddles," have generally been held not *prima facie* illegal.

Even when there is such a statute, a contract which is optional only as to the time of delivery is not illegal. The facts that the contract allows an option, or that it is a contract for the sale of gold, grain, stocks or any securities or commodities with which gambling transactions are notoriously frequent will not establish illegality. Nor, on the other hand, will the fact that the contract is about a matter lawful in itself be conclusive as to its legality. As remarked by Mr. Justice Thompson, in *Brua's Appeal*, 53 Penn. St. 298, "That the transaction

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in this case assumed the form of a contract about a matter lawful in itself was not conclusive as to its real motive. . . . That was the form which the South Sea Bubble took in England, the Tulip Speculation in Holland, and the *Morus Multicaulis* in this country; and the form served only as a thin covering of the most frightful systems of gambling ever known."

Other evidence as to the intentions of the parties is their own testimony. But may the parties themselves be called upon to testify orally in regard to their intentions at the time of making the contract? Judge Drummond decided that the defendant could not be permitted to show by parol evidence that the intention of both parties was that no grain should actually be delivered, and that the difference should be settled between them in cash. *Porter v. Viets*, 1 Biss. 177. He based his decision upon the ground that the admission of such evidence would contravene the rule prohibiting the introduction of parol evidence to contradict, alter or vary a written contract. But in *Cassard v. Hinman*, 1 Bosw. 210; 6 id. 13, it was decided that the admission of extrinsic evidence as to the intention of the parties is not in violation of the rule forbidding the introduction of parol evidence to contradict or vary the terms of a written instrument. It was said that this rule applies to the construction of written agreements only as valid, subsisting contracts, and that a party may always show by parol that an instrument is void because of fraud, want of consideration, or because it contravened some statute, rule of the common law or of public policy. And in *Yerkes v. Salomon*, 18 N. Y. Sup. Ct. 473, it is decided that a plaintiff in a suit upon an option contract may be asked, "Was it your intention, at the time those contracts or either of them were made, to tender or call for the stock, or merely to settle upon the difference?" The court said that the form of the contract did not decide this question, because it would not be difficult to make a contract relating to a bet apparently lawful, while the intent with which it was entered into was to avoid or evade the statute as to gaming.

The age and financial ability of the parties to the contract are facts which have an important bearing upon the question of intention. In Pennsylvania, where a minor of limited means embarks in stock transactions to a large amount by way of margins, the court will, even in the absence of direct evidence that he did not intend to receive or deliver the stock bought or sold on his behalf, infer that such was not his intent, and will therefore stamp his contracts as wagering contracts, contrary to law and void *ab initio*. *Ruchizky v. De Haven*, 97 Penn. St. 203.

It may be shown, too, that the person claiming under the contract was not a dealer in the commodity bought; that he had no contracts for such commodity to fill; that he did not intend to call for it, if the

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market price receded below that fixed in the agreement; that he made many other contracts to buy for such commodity, more in fact than he was financially able to pay for. *Kirkpatrick v. Bonsall*, 72 Penn. St. 155. In *Re Chandler*, 13 Am. Law Reg. N. S. 810, the proof of a "corner" consisted of evidence that notwithstanding there were but two million seven hundred thousand bushels of oats in store in May, and but eight hundred thousand bushels arrived in June, Chandler purchased in that time two million five hundred thousand bushels of cash oats, and June "options" to the amount of two million nine hundred and thirty-nine thousand four hundred bushels. He advanced the price from thirty-nine to forty-one cents per bushel, notwithstanding the price declined in New York and other markets. So that oats to ship from Chicago were not worth over thirty-three or thirty-five cents—and July options in Chicago were not worth over thirty-six cents in Chicago,—and immediately after Chandler's failure prices declined from forty-one to thirty cents, and even to twenty-six cents per bushel. The sellers of options and holders of "puts" got resolutions through the board of trade making new warehouses, where oats had never been stored before, "regular" for the performance of the contracts. Facts like these may be shown to prove that the contracts and transactions under investigation are fictitious, and not genuine sales and deliveries.

In the principal case the intention of the parties is very clearly shown by means of their correspondence and accounts rendered. Pamphlets or circulars issued by the parties may also throw light upon their intentions, and are always admissible for such a purpose.

It has been attempted in this note merely to indicate the rule of law as to the legality of stock and grain contracts, to show the criterion by which their legality may be determined, and the evidence from which the intention of the parties may be gathered. Other interesting matters pertaining to this subject will be discussed in a future note.

ADELBERT HAMILTON.¹

UNITED STATES v. CAMERON and others.

(*Eastern District of Missouri. April, 1883.*)

1. DEPOSITIONS IN CRIMINAL CASES—R. S. § 866.—Section 866 of the Revised Statutes, which authorizes a *dedimus potestatem* to take depositions according to common usage, to be issued in any case in which it is necessary, in order to prevent a failure or delay of justice, applies to criminal as well as civil cases.

¹ In *American Law Register*.

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2. SAME — "COMMON USAGE."— The words "common usage," as used in said section, refer to the usage prevailing in the courts of the state in which the federal court may be sitting.
8. SAME — "FAILURE OR DELAY OF JUSTICE."— The question whether the order is necessary in order to prevent a "failure or delay of justice" is for the court to determine in each case upon the facts presented.
4. SAME.— Where witnesses for the defendants, whose testimony was material, resided hundreds of miles beyond the limits of the district in which the case was to be tried, and where the defendants were unable to pay the cost of bringing them to the place of trial, *held*, that the necessity for making an order for a *dedimus potestatem* to take their depositions sufficiently appeared.

Indictment for conspiracy to defraud the United States of one hundred thousand acres of land. Motion of defendants for a *dedimus potestatem* to take the depositions of witnesses residing in Iowa, Wisconsin and Dakota.

William H. Bliss, District Attorney, for the government.

Dyer, Lee & Ellis, for defendants.

McCRARY, *Circuit Judge*.—Section 866 of the Revised Statutes of the United States provides that "in any case where it is necessary, in order to prevent a failure or delay of justice, any of the courts of the United States may grant a *dedimus potestatem* to take depositions according to common usage. . . ."

The district attorney insists that this statute does not authorize the action called for by the present motion; and he has, in a learned and elaborate argument, endeavored to establish the proposition that this statute applies only to civil causes. We do not concur in this view. Under the terms of the statute a *dedimus* may issue "in any case where it is necessary, in order to prevent a failure or delay of justice," not in any civil case, nor in any case at common law, in equity or in admiralty, but in "any case," which includes criminal as well as civil proceedings. This provision was

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originally enacted as a proviso to section 30 of the judiciary act of 1789, as follows:

“Provided that nothing herein shall be construed to prevent any court of the United States from granting a *dedimus potestatem* to take depositions according to common usage, when it may be necessary to prevent a failure or delay of justice, *which power they shall severally possess.*”

The judiciary act, of which this proviso is a part, was an elaborate statute relating to proceedings in the federal courts in both civil and criminal cases. If we were called upon to determine the true meaning of the proviso as it stood in the original act, the question might be to some extent doubtful. If the proviso be limited in its application to the subject matter of the section in which it is incorporated, it would apply only to civil proceedings, while if applied to the entire act it would extend to criminal proceedings as well. It might well be argued that the proviso was intended to be as broad as the act, and to confer a power upon the courts of the United States to grant a *dedimus* in any case, civil or criminal, when necessary to prevent a failure or delay of justice. The words “nothing herein” in the proviso might well be construed as equivalent to the words “nothing in this act.” This would be the broader and more liberal construction; and in a case where the benefit of the statute is invoked in favor of a person accused of crime, we think it should be so construed. But, however this may be, we are entirely clear that congress, in the enactment of the Revised Statutes of the United States, has adopted this interpretation by enacting the words of the proviso as a separate and independent section, and by so changing the form and phraseology of it as to leave no room for doubt. The provision now appears in the form first above quoted as the first clause of section 866 of that revision. That section is incorporated into chapter 17, entitled “Evidence.” The chapter deals with the general subject of evidence in both civil and criminal causes, some of its provisions referring to the lat-

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ter in express terms, and others by necessary implication. The section, as it stands in this chapter, is limited only by the subject matter of the chapter itself. The form is changed by dropping the words "provided that nothing herein shall be construed to prevent any of the courts of the United States from granting a *dedimus potestatem*," and by inserting instead the words "in any case where it is necessary," etc. The intent to make the power general and applicable to all cases seems to us to be very apparent.

The case falls, therefore, within the terms of the statute, unless it is excluded by the latter part of the clause above quoted, which is as follows: "Any of the courts of the United States may grant a *dedimus potestatem* to take depositions according to common usage." What are we to understand by the words "common usage?" We think the better opinion is that they refer to the usage prevailing in the courts of the state in which the federal court may be sitting. They mean common usage in the courts which administer justice in the same community. They cannot mean a usage known and recognized only at common law, as we think, because at the time when the statute was enacted it was common usage to take depositions under statutes, and at the present time any other practice in the courts of the states is practically unknown.

Sound policy undoubtedly demands that a party accused of crime in a federal court shall have the same rights with respect to obtaining evidence in his defense as are enjoyed by persons accused in the state tribunals. We think the statute should be interpreted, in the spirit of this policy, in favor of the accused. It is, besides, to our minds quite improbable that the words "common usage" would have been employed by the author of the judiciary act of 1789 as synonymous with "common law."

That act, as is well known, was drawn with great care and skill, and if it had been intended to limit the power to issue a *dedimus* to cases where it was authorized by the

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common law, this intent would have been expressed in unequivocal terms. The words "common usage" are never employed by accurate writers as equivalent to "common law."

In the case of *Buddicum v. Kirk*, 3 Cranch, 393, this provision of the act of 1789 is construed by reference to the laws of Virginia regulating the taking of depositions, and the suggestion that the words "common usage" referred to "common law," and not to usage sanctioned or authorized by statute, was not made. The case of *U. S. v. Reid*, 12 How. 361, relied upon by the district attorney, decides that the thirty-fourth section of the judiciary act, adopting state laws as rules of decision in federal courts, applied only to civil actions at common law. By its terms it was made applicable only to "trials at common law," and these words were held not to include a criminal prosecution. It was also held that in the trial of a criminal cause held in one of the original thirteen states the admissibility of evidence depended, under the judiciary act, upon the law of the state where the trial was held, as it was at the time of the passage of that act in 1789. This rule, however, has never been applied to the states admitted into the Union after the passage of the judiciary act, nor can it be, for the reason that a state can have no laws prior to its existence as a state. But we are not dealing with the thirty-fourth section of the judiciary act, but with section 866 of the Revised Statutes of the United States, which, in its present form, became the law of the land in 1874; and, for the purposes of the question now before us, we are, we think, justified in holding that the words "common usage," as found in this section, refer to the usual and customary mode of proceeding at the time of the adoption of the revision, which for many purposes, and we think for this purpose, must be regarded as an original enactment. Such being the true construction of the statute, we are at liberty to look into and follow the common usage of the courts of Missouri in similar cases, whether sanctioned

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by common law or statute. Upon looking into the laws of Missouri and the practice of her courts, we find that for many years they have authorized the taking of depositions in criminal cases on behalf of the defense, and that for perhaps half a century such has been the common usage in this state. The question whether the order is necessary to prevent a failure or delay of justice is for the court to determine in each case upon the facts presented.

In the present case we are of the opinion that the necessity sufficiently appears. The witnesses reside hundreds of miles from the place of trial, their testimony appears to be material, the defendants are unable to pay the cost of bringing them here to testify, and the court has no authority to pay this expense from the public treasury, because the witnesses reside beyond the limits of the district. We do not say that all these facts must necessarily appear, but we are clearly of the opinion that, appearing, they are sufficient.

It is to be observed that it is enough if the court is satisfied that the taking of depositions will prevent delay of justice. This is a wise provision, for without it the trial of criminal causes might be postponed indefinitely. No court would be inclined to force a defendant to trial in the absence of his witnesses, and without their testimony. If they reside in a distant state, and the defendant is a poor man, what is to be done? The government will not, and the defendant cannot, produce them. A subpoena may be issued and duly served; but would any court compel a witness to travel at his own expense to a state far distant from his home in order to give testimony? If so, what is to be done if the witness is unable to pay the expense of the journey? If the court cannot order depositions to be taken, and the witnesses are duly served and fail to appear, the cause for continuance would seem to be sufficient, and it might recur at every term of the court during the life-time of the defendant. In such a case it is clearly necessary to prevent

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a delay, if not a failure, of justice, that the order for a *dedimus* should be made.

It is insisted that this construction of the statute will enable defendants in criminal cases to manufacture evidence by taking depositions of accomplices and others, who will swear falsely; but the danger in this direction is little, if any, greater than that which would exist if the witnesses were all produced in court, for the government can always cross-examine, and its attorney can readily ascertain the reputation for truth and veracity of witnesses examined, and, if it is bad, can show it to be so upon the trial. On the other hand, if depositions cannot be taken, the danger of doing injustice to defendants in some cases would be very great indeed. The life or liberty of a party accused may depend upon the testimony of a witness thousands of miles away from the place of trial, and whose presence there cannot be procured, because the government will not pay the expense, and neither the witness nor the accused is able to do so.

It is also suggested that witnesses examined under a *dedimus* issued in a criminal case are not liable to the pains and penalties of perjury; but this argument presupposes that there is no authority of law for taking testimony in such cases by deposition, which, in our opinion, is not so.

The result is that the motion in this case must be granted, and it is so ordered.

TREAT, *District Judge*, concurs.

COBURN and another v. CLARK.

(*Eastern District of Missouri. March, 1883.*)

1. PATENTS—EFFECT OF DECISIONS AS TO VALIDITY—PRELIMINARY INJUNCTION.—Where a motion is made for a preliminary injunction for an alleged infringement of a patent, which has been held valid

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without collusion in a contested patent case, the validity of the patent will be considered settled for the purposes of the motion.

2. **SAME.**—Where, however, the decision does not show what claims were held valid, nor what would be an infringement, the following questions are left open, viz.: (1) What are the contrivances covered by the patent? (2) Has the defendant infringed the same?

Motion for a preliminary injunction to restrain the defendant from infringing two letters patent of the United States, one being for an "improvement in cases for transporting eggs," and the other for an "improvement in egg-boxes." The first of said patents contains two and the other three claims.

Overall & Judson, for complainants.

John M. and C. H. Krum, for defendant.

TREAT, District Judge.—It is unadvisable on a preliminary motion to express an opinion concerning the merits of a controversy to be determined at final hearing. It seems that the United States circuit court of the southern district of New York has held, on final hearing in a case before it, that plaintiffs' patents are valid, the decree in which case is for the purposes of this motion to be considered conclusive. It also appears that Judge McCrary, of this circuit, acting upon such adjudication, and possibly other matters presented, has awarded preliminary injunctions.

Under such rulings nothing remains but to grant similar orders, provided the alleged infringements are the same, substantially or colorably. It has been the course of proceedings here for more than twenty years, and elsewhere, to accept a decision in a patent case, when made on the merits, without collusion or on mere default, as an adequate basis for a preliminary injunction, so far as the validity of the patents is involved, leaving open for inquiry on such motion solely the question of infringement.

Under the rules governing such motions the decisions up-

holding the Stevens and Bryant patents must control. But what are those patents; that is, what do they cover? It is very easy to grant an order perfunctorily that defendant shall not infringe plaintiff's patents; but such a perfunctory order leaves open the whole subject of controversy. The defendant may deny an infringement, and, consequently, if his course of business does not infringe, what effect has the order? He is enjoined not to do what he has not done and what he does not propose to do. Hence the injunction order in such form would be a mere *brutum fulmen*. It is, therefore, essential to ascertain whether the defendant has *prima facie* infringed a valid patent, for the complainant has no right to drag into a court of equity as a defendant one who is not answerable to equitable proceedings. The defendant has a right to stand on his denials.

The primary inquiry is, the patents being considered valid, on what construction thereof plaintiff's rights are based. For the purposes of this preliminary investigation the patents must be considered valid, but there remains the question as to the true construction of the patents; *i. e.*, for what devices were the patents lawfully granted? It is to be noted that there has been, at least as to one of the patents, a disclaimer and a reissue, from which the matter patented has to be determined.

It is not proposed now to go behind the decision made in the southern district of New York (which settled nothing definitely as to what was really patented), which holds the patents valid. Nor is it proper to consider otherwise than as authoritative the interlocutory views of Judge McCrary, in this circuit, upon the patents in question. Hence there remain only two propositions to be considered: *First*, what are the contrivances covered by the patents? *Second*, has the defendant infringed the same?

It is held, for the purposes of this motion, that the plaintiffs have an exclusive right to the combination of more than two trays in a case; and also to the interlocked form of the

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separated trays. The injunction order will go against the infringement of said *combination*, and also of the construction of said interlocked form of trays. There are many suggestions proper concerning interlocutory orders in cases of this kind, which, if made, might be considered not in accord with the views expressed by many *nisi prius* courts, but which ought to be weighed more fully than has heretofore been done. For instance, a court in final hearing may decide a patent valid, which patent contains many claims, and the construction of which patent, as to one or many of the claims, is not disclosed, especially as to the alleged infringements of one or more of said claims. Is it to be taken for granted that the court held the patent valid as to each and every claim, when possibly the alleged infringement was as to one of the claims alone, and that claim was alone under consideration?

The cases now before the court are illustrative. Here are various patents,—one for combinations and another for mechanical devices. The patents have been held valid; but as to what? What construction has been given to the respective patents, and as to what alleged infringement? What shall now be held as concluded for the purpose of the present motions, unless it is disclosed what some other court decided in respect to each of the essential matters pertaining thereto? These questions are complex, and not perfunctory. An examination of the cases cited with regard to the very patents in question furnish very little light with regard to the subjects now in dispute.

A more searching inquiry is needed for preliminary injunctions than a mere perfunctory order, covering, in an indefinite manner, possibly, all the claims of a patent and all possible infringements of valid or invalid claims, when it is impossible to determine from a final decree what was in detail decided.

The true rule should require it to be shown what claim was held to be valid, the validity of that specific claim hav-

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ing been brought into question. It may be that the court, on final hearing, passed on only one of many claims, and that the alleged infringement in such a case pertained only to that specific claim. How is it as to other claims on which no decision has been made? Must a court, on a motion for a provisional injunction for alleged infringement of some other claim, deem itself concluded when no court has passed upon the specific inquiries? There should be a careful investigation of the precise points decided and of the alleged infringement, otherwise great wrongs may be perpetrated against one or the other of the parties litigant. Preliminary injunctions are not to be granted, it may be destructively, to defendants, merely because an indefinite decision has been made by some court whose views are not disclosed in its decree; and, on the other hand, when plaintiff's rights have been fairly determined, should piracy be tolerated *pendente lite*?

These general views are expressed in the interest of all parties to like controversies.

An examination of the several decisions in the United States circuit court for the southern district of New York fails to furnish any construction of the several patents whereby the action of this court can be aided, nor is it shown with distinctness what claims were held valid, nor what would be an infringement of claims held valid.

Without further comment the injunction order will be issued as herein stated, leaving for final hearing matters looking to the validity of the respective patents.

WHITE, WASHER & KING v. WESTERN UNION TELEGRAPH CO.

(District of Kansas. June, 1882.)

1. TELEGRAPH MESSAGES — NEGLIGENT TRANSMISSION — LIABILITY.—

In an action for damages for negligence in the transmission of a message by a telegraph company, whereby the sender of the mes-

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sage suffered pecuniary loss, the burden of proof rests upon the plaintiff to show that the error or mistake occurred through the culpable carelessness and gross negligence of the operators or employees of the company; a simple mistake in transmitting a dispatch is not sufficient to render the company liable.

2. **SAME — NATURAL CAUSES.**— Where the errors or mistakes in the transmission of the dispatch occurred through climatic influences, such as storms, lightning, rain, or other natural causes, temporarily affecting the insulation of the wires, or the working of the instruments, the company is not responsible; as the mere fact that a mistake was made in the message transmitted would not itself authorize any recovery for more than nominal damages.
3. **SAME — CONTRACT RESTRICTING LIABILITY.**— A contract written at the head of a telegraph dispatch, restricting the liability of the company for loss from mistake or negligence in the transmission or delivery of the dispatch, will not exonerate the company from loss or damage caused by the wanton carelessness or gross negligence of its servants, agents or operators.
4. **SAME — NEGLIGENCE.**— The highest degree of care is not required of telegraph companies in the transmission of messages over its lines; if ordinary care is exercised by its agents, employees or operators, it is sufficient to exonerate them from liability for loss or damage.
5. **SAME — GROSS NEGLIGENCE.**— Gross negligence is that want of care which a person habitually careless and negligent would exercise in business transactions.

This was an action to recover damages by reason of an alleged mistake in transmitting a dispatch over the lines of defendant's company. The dispatch was sent pursuant to certain regulations and conditions as contained in the telegraph blank upon which the message was written. The original dispatch, together with the printed form upon which the same was written, is as follows, to wit:

“THE WESTERN UNION TELEGRAPH COMPANY.

“*All messages taken by this company subject to the following terms:* To guard against mistakes or delays the sender of a message should order it repeated; that is, telegraphed back to the originating office for comparison. For this one-half the regular rate is charged in addition. It is agreed between

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the sender of the following message and this company that said company shall not be liable for mistakes or delays in the transmission or delivery, or for non-delivery, of any un-repeated message, whether happening by negligence of its servants or otherwise, beyond the amount received for sending the same, nor for mistakes or delays in the transmission or delivery, or for non-delivery, of any repeated message beyond fifty times the sum received for sending the same, unless specially insured; nor in any case for delay arising from unavoidable interruption in the working of its lines, or for errors in cipher or obscure messages. And this company is hereby made the agent of the sender without liability to forward any message over the lines of any other company when necessary to reach its destination. Correctness in the transmission of messages to any point on the lines of this company can be insured by contract in writing, stating agreed amount of risk and payment of premium thereon at the following rates, in addition to the usual charge for repeated messages, viz.: one per cent. for any distance not exceeding one thousand miles, and two per cent. for any greater distance. No employee of the company is authorized to vary the foregoing. The company will not be liable for damages in any case where the claim is not presented in writing within sixty days after sending the message.

“6-18-1879.

“Send the following message, subject to the above terms, which are agreed to:

“‘*To McGinnity, Adams & Sherry, St. Louis.*

“‘Sell fifteen July wheat; sell rye fifty-two or more.

“‘WHITE, WASHER & KING.’

“Read the notice and agreement at the top.”

The mistake in transmitting the dispatch was in substituting the words “fifty” July wheat for the words “fifteen” July wheat, as the message was originally written, and the plaintiff’s brokers having sold fifty thousand bushels of wheat for July delivery, a change in the market caused loss

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to the plaintiffs, who claimed damages by reason of the error in transmitting the dispatch.

Tomlinson & Griffin and *W. W. Guthrie*, for plaintiffs.

Everest & Waggener, for defendant.

FOSTER, *District Judge (charging jury)*.—I desire to get before your minds the facts upon which you are to pass in arriving at a verdict from the evidence in this case. There has been a great deal of discussion about the law, and some discussion upon the evidence. I will first call your attention to the issues in this case, and the facts that are admitted and uncontroverted, and the facts remaining for you to pass upon by your verdict. It is not controverted in this case that the plaintiffs, White, Washer & King, in the month of June, took to the Western Union telegraph office, in Atchison, this dispatch for transmission to their agents at St. Louis, Missouri. It reads as follows; that is, the written part: "6-18-1879. To McGinnity, Adams & Sherry, St. Louis: Sell fifteen July wheat; sell rye fifty-two or more." When the dispatch was received by the parties to whom it was transmitted, in the place of fifteen it read fifty—"sell fifty July wheat." This is an error or mistake it seems that had occurred in the transmission of this dispatch from some cause or other, and in its transmission from Atchison to the persons to whom it was addressed in St. Louis. That in pursuance of the dispatch which they received they made a contract according to its directions and sold in the name of White, Washer & King, to some parties in St. Louis, fifty thousand bushels of wheat instead of fifteen. It is claimed here, and I believe it is admitted, that this dispatch, construed by the terms and understood by men dealing in grain, "fifteen" meant fifteen thousand July wheat. After the error was discovered, which was within a day or two, the plaintiffs in this case sought to relieve themselves from this contract, as it was not in accordance with what they intended

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to make; it was throwing a much larger burden and contract on them than they intended to enter into; and they had a conversation with the manager of the defendant company at Atchison, and stated the mistake and error, and the difficulty that it had got them into, and asked that the company should relieve them from it, and assume the responsibility and take the contract off their hands, or give some directions about it; that the company did not do so. Mr. Levin, agent of defendant at Atchison, states that he did not have authority to act in that matter; at any rate, defendant did not do so, and no action was taken on its part, and two days afterwards plaintiffs in this case made the best of terms they could to settle up with the other parties in St. Louis, and be relieved from the responsibility of this contract, and in doing so it appears they sustained a loss of something over \$900. They sustained damage by reason of this error, by reason of the over amount of thirty-five thousand bushels, of nine hundred and forty some odd dollars. Now they bring this suit against the Western Union Telegraph Company to recover back these damages, alleging in their petition that the Western Union Telegraph Company, its agents, servants and employees, were guilty of carelessness or negligence in transmitting this dispatch, and thus this mistake or error occurred, and from that arose the damages.

Now, the paper upon which this dispatch is written is a form prepared by the defendant company, and in it are certain rules and regulations limiting and restricting their liability in the transmission of the dispatch, and having been signed by the plaintiffs with these terms and conditions, which they say are agreed to, this in substance forms the contract upon which this dispatch was to be transmitted. I say it in substance forms it, and limits it. There are some things, however, that are sought in this contract by the defendant company to relieve it from certain liability which the law will not permit, and that is that they cannot contract for immunity from damages occasioned by the culpa-

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ble negligence or gross carelessness of their employees; and hence, if this mistake or this error arose from the culpable negligence or gross carelessness or wilful neglect of the employees of the defendant company, then the defendant company would be responsible for the damages that the plaintiffs have sustained. Because, while the law imposes upon this corporation, not all the duty and responsibility of a common carrier, yet they owe to the public certainly some degree of care and diligence, on the part of their employees and servants, to transmit and deliver the message properly and safely. I say they owe some degree, although not a high degree; perhaps a slight degree of care and diligence would be all that would be required under the law.

The burden rests upon the plaintiffs in the case to maintain the issues which they present; that is, the burden rests upon the plaintiffs to show that this error or mistake occurred through the culpable negligence or gross carelessness of the operators or employees of the defendant company. It is not sufficient for them to say there is a mistake which has occurred in transmitting this dispatch to the office of the company in St. Louis, but they must show that it occurred through the gross carelessness or culpable negligence of the employees of the defendant company. The defendant in this case, of course, denies this carelessness or negligence, and it further claims that it should be relieved from responsibility for the transmission of this dispatch because it was obscure; and there is a stipulation in this printed matter, upon this form, in which it stipulated for immunity for the transmission of dispatches in cipher or obscure messages. That is a reasonable stipulation, and an alternative restriction that the law would permit the company to make; that is, if the dispatch is in cipher or obscure, that they do not understand the meaning of it, if the operator does not understand the meaning of it, and did not understand the importance of the dispatch, and the necessity of using care and diligence, and damages in consequence of that might result and natu-

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rally follow from a failure to transmit the dispatch correctly, then the law says, if the operator did not understand it, the company should not be held responsible for the damage. So these are the two questions I wish to submit to you for your determination: First, were the agents, servants and employees, or operators (perhaps I might confine it), guilty of culpable negligence or gross carelessness in transmitting this dispatch, and did the error or mistake arise from that culpable negligence or gross carelessness? Next, did the operators or employees understand what this dispatch meant, or was it obscure? These are the two questions, gentlemen of the jury, for you to determine; and I have formulated the law upon these two questions, and will read it to you. If you find from the evidence that the telegram in question was erroneously and incorrectly transmitted or received through the culpable or gross negligence of the operators in the employment of the defendant company, either at Atchison or St. Louis, or both, and that the operators understood the meaning of said telegram, then the plaintiffs are entitled to a verdict.

But, if you should find from the evidence that the error was not occasioned by reason of the culpable negligence of the defendant's operators, but occurred through climatic influences, such as storms, lightning, rain or other causes temporarily affecting the insulation of the wires, or affecting the working of the instruments, then the defendant is not responsible for the error, and is entitled to a verdict; or, if this dispatch was obscure, and the operators did not understand the meaning of it, then they should not be held responsible.

Upon that point, gentlemen of the jury, you have heard detailed here by the witnesses who are experts; that art, as understood at this time, is subject, under certain circumstances, to difficulties and uncertainties, and hence the reasonableness of the telegraph company to limit their legal responsibility in the transmission of dispatches; and those

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uncertainties and difficulties, as you have heard detailed here by the witnesses, result from various causes, mostly from climatic influences or the state of the weather. It may affect the insulation of the wires, or by striking against some other obstruction, or by being overcharged with electricity. When these things occur, the witnesses tell you that they find difficulty in transmitting and receiving dispatches correctly; that the art has not become so perfect but that, under certain circumstances during storms, and under certain circumstances which I have related, there is more difficulty in transmitting dispatches; and the use of care and diligence, even, will not enable them, under all circumstances, to transmit the dispatches just as they should be transmitted. These things, of course, should be considered and given their proper weight, and it is for you to determine. You have heard the evidence on the other side, when the weather is clear and fair and the line in perfect order and the instruments all right, that nothing but unwarranted carelessness or gross negligence would result in an error of this kind. This is the testimony of the witnesses on the part of the defense, and they substantially state that when the line is in order, and the instrument in order, the dispatch should be sent, unless the operator was grossly and culpably negligent, and received at St. Louis in just the exact words desired. You have heard the evidence as to the condition of the weather; you have heard the evidence as to the difficulty that the operator at St. Louis says he experienced in getting this dispatch; you have heard his testimony, that he thought there was some difficulty on the line somewhere; there seemed to be something the matter.

Now, was that error or mistake occasioned by reason of the difficulty on the line, arising from the weather or something interfering with the insulation of the wires, or something of that kind; or was it simply a matter of wanton carelessness or gross negligence on the part of either the operator sending, or the operator receiving, this message.

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Gentlemen, you have to determine this from the evidence in the case. If the said dispatch was not obscure to the defendant's operators, and a slight degree of care and caution on their part would have prevented the said error, and they failed to exercise such degree of care and diligence in transmitting said dispatch, then said defendant is liable for any damages occasioned by the plaintiffs by reason thereof; that is, the defendant and its operators are only held to a slight degree of care and diligence.

If, however, the dispatch was obscure to the operators, or if said operators did use such slight degree of diligence to transmit said dispatch correctly, then the company is not liable in damages. Now, upon that point, as to whether that dispatch was obscure to the agent or operator of the company, that means, in substance, did the operator understand what it meant? You will have to recollect the testimony upon that point. The testimony in reference to that is that the dispatch was in the form used by men dealing in grain; that it was a form well understood by members of the board of trade in large cities and in St. Louis where this dispatch was sent; that defendant was transmitting a multitude of dispatches each day during the grain season, and other parties than plaintiff were sending dispatches couched in similar terms; and the statement of Mr. Levin, who was the manager of defendant there, and he did not deny but what he understood it, and because he understood it he thought the other operator did. Here you have, gentlemen, the evidence as to that. It is for you to determine from all the evidence whether it is reasonably established and shown from the evidence in the case that the operators sending and receiving this dispatch understood what it meant.

There has been some talk here to the jury about dealing in options, etc., and an instruction asked on that point which I have refused to give. In fact, I did not know there was any such evidence before the jury until the deposition was read by Mr. Everest, attorney for defendant, in his

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argument as evidence for the defendant; but we have Mr. King saying that it was a real transaction; that they were grain dealers; they had some grain there, and they had contracted for the balance of it with farmers, expecting to fill the contract. I did not know there was anything on the other side; nothing was read until the argument was made. I do not think anything was sent to the jury. The defendant asks for certain instructions, some of which, although I may have given them to you, I will give certain of them as asked for; the others I refuse. Those I give are as follows: The jury are further instructed that while the dispatch in question might be understood among grain men to mean fifty thousand bushels of wheat, to be delivered at any time during the month of July, 1879, yet said message, reading on its face, "Sell fifteen July wheat," would not of itself convey to the defendant or its agents any such nature or character of the dispatch, and in order for plaintiffs to recover they must establish by a preponderance of the evidence, to the satisfaction of the jury, that the agent of the defendant receiving such dispatch for transmission was informed or knew the true meaning and nature of the dispatch; that the operator was informed, or knew without being informed, if he had the information before. In order that defendant or its agents might have observed the precaution necessary to guard against the risk which might be incurred, its true intent and meaning should have been disclosed to it or its agents, and unless the jury find from the evidence that the nature and character of the dispatch were disclosed to or understood by the agents who received and transmitted such dispatch, then the plaintiffs are entitled to only nominal damages, which is the cost of sending the message, and which, in this case, is admitted to be the sum of fifty cents.

The jury are instructed that in this case it is incumbent on the plaintiffs to establish by a preponderance of the evidence every fact necessary or essential for their recovery, and the mere fact that a mistake was made in the message trans-

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mitted would not of itself authorize any recovery against defendant for anything more than nominal damages, which, in this case, is the cost of the message sent.

The jury are further instructed that before they can find for the plaintiffs for more than nominal damages the plaintiffs must establish to the satisfaction of the jury, by a preponderance of the evidence, something more than the mere fact that a mistake was made in the transmission of the message, but must further so establish that such mistake was on account of gross negligence or wilful misconduct of the defendant or its agents in the transmission of such message; and if the jury find, from the evidence, that the defendant exercised ordinary care in the transmission of such message, and no demand was made by plaintiffs to have such message repeated, then, under the terms of the contract under which such message was sent, plaintiffs can recover only the costs of sending such message. The jury are instructed that in this case in no sense is the defendant to be held liable as a common carrier or subject to the rule governing common carriers; nor is the defendant to be held as an insurer of the correct transmission of the message; nor is the defendant liable for a failure to exercise extraordinary care, or failure to exercise even ordinary care and diligence, in the transmission of this message, the same being an unrepeatd message; and before the plaintiffs can recover any more than nominal damages herein, which is the price of sending the message, it is incumbent on the plaintiffs to establish, by preponderance of the evidence, that the defendant, its agents or servants, were guilty of gross negligence or wilful misconduct in its duty herein. Gross negligence means that want of care which a person habitually careless and negligently would ordinarily exercise in business transactions, and in this case neither the highest degree of care and diligence was required of defendant, as nothing beyond the exercise of slight care was required or demanded of defendant.

The jury are instructed that the defendant would not be

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liable for errors or imperfections in transmitting the message which arose from causes not within its control,—that is, failure of the electrical current, irregularities in its power or efficiency, and interruptions or confusions arising from storm or wind, heat or cold; nor from imperfections in the working of the wire arising from necessary imperfections or inherent characteristics in the metals, or from things necessarily pertaining to the business of communicating by telegraph, or the machinery and implements invented for the purpose.

On the part of the plaintiffs I give you the following: If the jury believe from the evidence that the mistake was made in transmitting the message through the gross negligence of the defendant or its agents and servants, and that plaintiffs suffered damage by reason of such mistake in transmitting said message, the defendant is responsible for such damage, although the jury may believe from the evidence that plaintiff used one of the forms of defendant having the terms printed at the top, as shown by the form set up in the answer to plaintiffs' petition, and that said plaintiffs assented and agreed to such terms, and did not require said message to be repeated, or its correct transmission insured.

Gentlemen of the jury, if you find for the plaintiffs in this case—if you find the plaintiffs are entitled to a verdict—the measure of damage will be \$943.05, with interest at seven per cent. from the date of the demand, which is July 11, 1879, unless you should believe their right to recover upon the obscurity of the dispatch, or the liability of the company arising alone on the obscurity of the dispatch. In that case I would say, as defendant claims, that plaintiffs are entitled to nominal damages only; it does not deny but what it is liable for cost of sending the message. You will find either one thing or the other.

Gentlemen, you have the form of the verdicts, and will fill the blanks as you may find and assess the damages.

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NOTE.—TELEGRAPH COMPANIES—THE NATURE OF THEIR SERVICE.—A telegraph company is a public agency, and is subject to public regulation and control. *Western U. Tel. Co. v. Carew*, 15 Mich. 525; *New York, etc. Tel. Co. v. Dryburg*, 35 Pa. St. 302; *Bartlett v. Western U. Tel. Co.* 62 Me. 217; *De Rutte v. New York, etc. Tel. Co.* 30 How. Pr. 413; 1 Daly, 517; *Wann v. Western U. Tel. Co.* 37 Mo. 481; *Tyler v. Western U. Tel. Co.* 74 Ill. 168; *Parks v. Alta California Tel. Co.* 13 Cal. 422; *Passmore v. Western U. Tel. Co.* 78 Pa. St. 242; *Ellis v. American Tel. Co.* 13 Allen, 226. It is bound, therefore, to receive and transmit messages for all impartially; and it cannot give a preference to one individual or corporation over another. To this extent its nature and duties are those of a common carrier, and it would seem to follow that, as regards its liabilities for the performance of its functions, it should be held to the same extent as a common carrier under the rules of the common law. In an early case in California (*Parks v. Alta California Tel. Co.* 13 Cal. 422), the court went as far as this. "The rules of law which govern the liability of telegraph companies," said Baldwin, J., "are not new. Such companies hold themselves out to the public as engaged in a particular branch of business in which the interests of the public are deeply concerned. They propose to do a certain service for a given price. There is no difference in the general nature of the legal obligation of the contract between carrying a message along a wire and carrying goods or a package along a route. The physical agency may be different, but the essential nature of the contract is the same. The breach of contract in one case or the other is or may be attended with the same consequences; and the obligation to perform the stipulated duty is the same in both cases. The importance of the discharge of it in both respects is the same. In both cases the contract is binding, and the responsibility of the parties for the breach of duty is governed by the same general rules." A similar opinion was expressed in the English court of common pleas in 1855 (*McAndrew v. Electric Tel. Co.* 17 C. B. 3), Jervis, C. J., saying that the defendant company was "in the nature of a carrier who would have a certain liability imposed upon him at common law, but they might limit this liability by special notice as a carrier could, subject to the condition or qualification that they could not limit it to the extent of protecting themselves against the consequences of their gross negligence." Later English cases (*Dickson v. Renter's Tel. Co.* 8 C. P. Div. 7; 2 C. P. Div. 62) appear to qualify this expression; but the absorption of the telegraph companies in Great Britain by the government changes their relation to the people of that country to a considerable extent. In the United States, excepting a *nisi prius* decision of little authority (*Bowen v. Lake Erie*

¹ From *Federal Reporter*.

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Tel. Co. 1 Amer. Law Rep. 685; Allen, *Tel. Cas.* 7), the rule of the California court has not been followed, and telegraph companies are not held to the extraordinary responsibilities of common carriers; that is to say, they are not insurers of the correct transmission of the messages received by them, excepting the act of God and the public enemy. *Binney v. New York, etc. R. Co.* 18 Md. 341; *New York, etc. Tel. Co. v. Dryburg*, 35 Pa. St. 296; *Shields v. Washington, etc. Tel. Co.* 11 Amer. Law T. 811; Allen, *Tel. Cas.* 7; *De Rutte v. New York, etc. Tel. Co.* 1 Daly, 547; *Breese v. United States Tel. Co.* 45 Barb. 274; *Western U. Tel. Co. v. Ward*, 23 Ind. 377; *Western U. Tel. Co. v. Carew*, 15 Mich. 525; *Ellis v. American Tel. Co.* 13 Allen, 266; *United States Tel. Co. v. Guildersleeve*, 28 Md. 283; *Baldwin v. United States Tel. Co.* 45 N. Y. 744; 54 Barb. 506; 6 Abb. Pr. (N. S.) 405; 1 Lans. 125; *Leonard v. New York, etc. Tel. Co.* 41 N. Y. 544; *Passmore v. Western U. Tel. Co.* 78 Pa. St. 238; *Bryant v. American Tel. Co.* 1 Daly, 575; *De Rutte v. New York, etc. Tel. Co.* 30 How. Pr. 403; 1 Daly, 547; *Wann v. Western U. Tel. Co.* 37 Mo. 472; *Washington, etc. Tel. Co. v. Hobson*, 15 Grat. 122; *Bartlett v. Western U. Tel. Co.* 62 Ms. 209; *Western U. Tel. Co. v. Fontaine*, 58 Ga. 438; *Camp v. Western U. Tel. Co.* 1 Metc. (Ky.) 164; *Aiken v. Tel. Co.* 5 S. C. 358. The reasons for this doctrine are generally said to be best stated by Johnson, J., in a case decided in New York in 1866: "The business in which the [company] is engaged, of transmitting ideas only from one point to another by means of electricity, operating upon an insulated and extended wire, and giving them expression at the remotest point of delivery by certain mechanical sounds, or by marks or signs indented, which represent words or single letters of the alphabet, is so radically and essentially different, not only in its nature and character, but in all its methods and agencies, from the business of transporting merchandise and material substances from place to place by common carriers, that the peculiar and stringent rules by which the latter are controlled and regulated can have very little just and proper application to the former. And all attempts heretofore made by courts to subject the two kinds of business to the same legal rules and liabilities will, in my judgment, sooner or later have to be abandoned as clumsy and indiscriminating efforts and contrivances, which have no natural relation or affinity whatever, and at best but a loose and mere fanciful resemblance. The bearer of written or printed documents and messages from one to another, if such was his business or employment, might very properly be called and held a common carrier; while it would obviously be little short of an absurdity to give that designation or character to the bearer of mere verbal messages, delivered to him by mere signs of speech, to be communicated in like manner. The former would have something which is or might be the subject of property, capable of being lost, stolen or

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wrongfully appropriated, while the latter would have nothing in the nature of property which could be converted or destroyed, or form the subject of larceny, or of tortious caption and appropriation even by the king's enemies." *Breese v. United States Tel. Co.* 45 Barb. 274; 31 How. Pr. 86.

DEGREE OF CARE AND DILIGENCE REQUIRED.—Nevertheless, the degree of care which telegraph companies are bound to exercise, if properly laid down and applied, will, perhaps, render their service as efficient, so far as the public is concerned, as though they were held to the engagement of insurers. Not that there have not been considerable differences of opinion and some apparently illogical reasoning in the courts. Thus some courts, as in the principal case, have held them to a very low degree of care, while others have adopted a better standard. "Due and reasonable care" (*Ellis v. American Tel. Co.* 18 Allen, 226), "exact diligence" (*Passmore v. Western U. Tel. Co.* 78 Pa. St. 289), "ordinary care and diligence" (*Baldwin v. United States, etc. Tel. Co.* 18 Allen, 226), are phrases which have been used to describe this latter requisite. They, however, all tend to require on the part of the companies "the use of good apparatus and instruments, and reasonable skill, and a high degree of care and diligence in their operation." *Western U. Tel. Co. v. Carew*, 15 Mich. 525.

POWER TO LIMIT LIABILITY.—"It being now settled by an overwhelming weight of authority that a common carrier may limit his liability by a special contract made with his customer (see *Lawson on Carriers*, § 28 *et seq.* and cases cited), it is hardly possible to doubt that the same freedom to enter into agreements prescribing the methods of carrying out its service, and the circumstances under which it is to be liable, must be given to a telegraph company. Accordingly, it has been expressly held in a number of cases that a telegraph company may limit its ordinary liability by a contract or a notice assented to by the sender of the message." *McAndrew v. Electric Tel. Co.* 17 C. B. 8; *Young v. Western U. Tel. Co.* 65 N. Y. 163; *Breese v. United States Tel. Co.* 48 N. Y. 132; *De Rutte v. New York, etc. Tel. Co.* 1 Daly, 547; *Sweatland v. Illinois, etc. Tel. Co.* 27 Iowa, 433; *Manville v. Western U. Tel. Co.* 37 Iowa, 214; *Western U. Tel. Co. v. Buchanan*, 35 Ind. 429; *Western U. Tel. Co. v. Tyler*, 74 Ill. 63; 60 Ill. 421; *Passmore v. Western U. Tel. Co.* 78 Pa. St. 288; 9 Phila. 90; *Harris v. Western U. Tel. Co.* 9 Phila. 88; *Wolf v. Western U. Tel. Co.* 62 Pa. St. 83; *Western U. Tel. Co. v. Carew*, 15 Mich. 525; *Wann v. Western U. Tel. Co.* 37 Mo. 473; *United States Tel. Co. v. Gildersleeve*, 29 Md. 232; *Camp v. Western U. Tel. Co.* 1 Metc. 164; *Western U. Tel. Co. v. Graham*, 1 Cal. 230; *Ellis v. American Tel. Co.* 18 Allen, 226; *Redpath v. Western U. Tel. Co.* 112 Mass. 71; *Grinnell v. Western U. Tel. Co.* 118 Mass. 299.

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NEGLIGENCE CANNOT BE CONTRACTED AGAINST.—But a common carrier is not permitted to get rid of its liability for an act of negligence on its part by a contract or agreement with its customer. Lawson on Carriers, § 28 *et seq.* Neither, and for the same reasons of public policy, can a telegraph company escape liability for the consequences of the negligence of itself or its duly authorized agents. *McAndrew v. Electric Tel. Co.* 17 C. B. 1; *Western U. Tel. Co. v. Buchanan*, 35 Ind. 429; *True v. International Tel. Co.* 60 Me. 19; *Breese v. United States Tel. Co.* 48 N. Y. 182; *Redpath v. Western U. Tel. Co.* 113 Mass. 71; *Grinnell v. Western U. Tel. Co.* 113 Mass. 299; *Ellis v. American Tel. Co.* 13 Allen, 226; *Candee v. Western U. Tel. Co.* 34 Wis. 471; *Western U. Tel. Co. v. Fontaine*, 58 Ga. 433; *Wann v. Western U. Tel. Co.* 37 Mo. 472; *Dorgan v. Telegraph Co.* 1 Amer. Law T. Rep. 406; *Sweatland v. Illinois, etc. Tel. Co.* 27 Iowa, 433. Some courts, however, have restricted this lack of power to contract to what is called "gross" negligence. As in *Redpath v. Western U. Tel. Co.* 113 Mass. 71; *Grinnell v. Western U. Tel. Co.* 113 Mass. 299. A better rule, however, has been laid down in the majority of the decisions, viz., that notwithstanding a condition in the contract between the sender and the company, the latter will still be liable for mistakes happening in consequence of its own fault, such as want of proper skill, or ordinary skill, on the part of its operatives, or the use of defective instruments, but will not be liable for mistakes occasioned by causes beyond its control, such as atmospheric changes or the vagaries of electricity, provided these mistakes could not have been avoided by the exercise of ordinary care and skill on the part of the operating agents of the company. *Sweatland v. Illinois, etc. Tel. Co.* 27 Iowa, 433; *Manville v. Western U. Tel. Co.* 37 Iowa, 214; *Passmore v. Western U. Tel. Co.* 78 Pa. St. 298; 9 Phila. 88; *Candee v. Western U. Tel. Co.* 34 Wis. 471; *Western U. Tel. Co. v. Tyler*, 74 Ill. 168; 60 Ill., 421; *Aiken v. Telegraph Co.* 5 S. C. 358; *Western U. Tel. Co. v. Graham*, 1 Col. 230.

CONDITIONS AS TO REPEATING MESSAGES.—The blanks of a telegraph company usually contain a condition that if the message is not repeated—for which service an extra charge is asked—the company shall not be liable beyond a certain small amount; generally the sum paid for the telegram, or fifty times its amount. Such conditions are sustained as reasonable; but at the same time they are not allowed to exclude the company's liability for negligence. *Sprague v. Western U. Tel. Co.* 6 Daly, 200; *Baldwin v. United States Tel. Co.* 45 Barb. 505; 1 Lans. 126; 6 Abb. Pr. (N. S.) 195; 45 N. Y. 744; *Bryant v. American Tel. Co.* 1 Daly, 575; *New York, etc. Tel. Co. v. Dreyburg*, 35 Pa. St. 298; 3 Phila. 408; *Dorgan v. Telegraph Co.* 1 Amer. Law T. Rep. 406; *True v. International Tel. Co.* 60 Me. 9; *Binney v. New York, etc. Tel. Co.*

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18 Md. 341; *Western U. Tel. Co. v. Graham*, 1 Cal. 230; *Manville v. Western U. Tel. Co.* 37 Iowa, 214; *Western U. Tel. Co. v. Fenton*, 52 Ind. 1; *Hibbard v. Western U. Tel. Co.* 33 Wis. 558; *Seiler v. Western U. Tel. Co.* 3 Amer. Law Rev. 777. They are, however, a sufficient protection where the mistake or delay is not due to the negligence of the company or its servants. *Id.*; *Schwartz v. Atlantic, etc. Tel. Co.* 18 How. 157; *Becker v. Western U. Tel. Co.* 11 Neb. 87.

OTHER CONDITIONS.—Other conditions have been sustained as reasonable, viz., that the insurance company shall not be liable unless the claim is presented within sixty days after sending the message. *Young v. Western Union Tel. Co.* 65 N. Y. 163; *Wolf v. Western Union Tel. Co.* 62 Pa. St. 83.

KNOWLEDGE BY SENDER OF CONDITIONS.—Of course there can be no contract between the sender and the company which the latter can set up to restrict its liability unless it has been assented to by the former. But notice of the company's regulations and the conditions which it seeks to put upon the sender are given to him by printing them on the blanks upon which the message is written, and by the sender using the blanks without dissent he is taken to assent to the conditions which they contain. *Western Union Tel. Co. v. Carew*, 15 Mich. 255; *De Rutte v. New York, etc. Tel. Co.* 1 Daly, 547; 30 How. Pr. 408. And he will not be permitted to show that he did not read or understand the conditions. *Grinnell v. Western Union Tel. Co.* 113 Mass. 299; *Redpath v. Western Union Tel. Co.* 112 Mass. 71; *Breese v. United States Tel. Co.* 48 N. Y. 132; 45 Barb. 174; *Young v. Western Union Tel. Co.* 65 N. Y. 163; *Wolf v. Western Union Tel. Co.* 62 Pa. St. 83; *Western Union Tel. Co. v. Buchanan*, 35 Ind. 429. For the same reason, if a person is familiar with the regulations of the company—as by having sent previous messages—he will be taken to have assented to those conditions if he sends a dispatch written on a business card of his own. *Western Union Tel. Co. v. Buchanan*, 35 Ind. 429.

BURDEN OF PROOF.—From the fact that the company has failed to deliver the message as sent the presumption of negligence arises, and the burden of proof is therefore on the company to show that the failure arose from a cause for which they are not legally responsible to answer. *Baldwin v. U. S. Tel. Co.* 45 N. Y. 744; *De Rutte v. N. Y. Tel. Co.* 1 Daly, 547; 30 How. Pr. 413; *Rittenhouse v. Independent Line*, 44 N. Y. 263; *Turner v. Hawkeye Tel. Co.* 41 Iowa, 458; *Bartlett v. Western Union Tel. Co.* 62 Me. 209; *Dorgan v. Telegraph Co.* 1 Amer. Law T. Rep. 406; *Western Union Tel. Co. v. Carew*, 15 Mich. 525; *Tyler v. Western Union Tel. Co.* 74 Ill. 168; 60 Ill. 421. *Contra, Sweatland v. Illinois, etc. Tel. Co.* 29 Iowa, 433; *United States Tel. Co. v. Gildersleeve*, 29 Md. 282.

REFUSAL TO TRANSMIT.—We have seen (*ante*, § 1) that the company cannot legally refuse to send a message for any one tendering, and that

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it cannot give a preference to one person or corporation over another. See, also, *Western Union Tel. Co. v. Ward*, 28 Ind. 877; *United States Tel. Co. v. Western U. Tel. Co.* 56 Barb. 48; *Davis v. Western Union Tel. Co.* 1 Cin. 100. It has been held that it may refuse to send a dispatch which is expressed in indecent, obscene or filthy language; but that, if such does not appear on the face of the dispatch, it cannot justify a refusal to transmit it, on the ground that the message was sent for an illegal or immoral purpose. *Western Union Tel. Co. v. Ferguson*, 57 Ind. 495.

MEASURE OF DAMAGES.—The rule as to the measure of damages in actions against telegraph companies is well stated by Earl, C. J., in a New York case (*Leonard v. New York, etc. Tel. Co.* 41 N. Y. 514): "The damages must be such as the parties may fairly be supposed to have contemplated when they made the contract. Parties entering into contracts usually contemplate that they will be performed, and not that they will be violated. They very rarely actually contemplate any damages which would flow from any breach, and very frequently have not sufficient information to know what such damages would be. . . . A party is liable for all the direct damages which both parties to the contract would have contemplated as flowing from its breach, if, at the time they entered into it, they had bestowed proper attention upon the subject, and had been fully informed of the facts." As a rule, the actual damages sustained by the plaintiff are recoverable. Thus, where a dispatch ordering "one shawl," which when delivered, read "one hundred shawls" (*Bowen v. Lake Erie Tel. Co.* 1 Amer. Law Reg. 685); where the message, as delivered to the operator, read "two hand bouquets," but, as delivered to the receiver, read "two hundred bouquets" (*New York, etc. Tel. Co. v. Dreyburg*, 8 Phila. 408; 85 Pa. St. 298); where the company delivered an incorrect market report (*Turner v. Hawkeye Tel. Co.* 41 Iowa, 458); where the message was never sent as ordered (*Sprague v. Western U. Tel. Co.* 53 Ind. 1; *Manville v. Western U. Tel. Co.* 87 Iowa, 214; *De Rutte v. New York, etc. Tel. Co.* 1 Daly, 547; 80 How. Pr. 408; *Davis v. Western U. Tel. Co.* 1 Cin. 100; *Parks v. Alta California Tel. Co.* 18 Cal. 422); where an order for five thousand "sacks" of salt was delivered as calling for five thousand "casks" (*Leonard v. New York, etc. Tel. Co.* 41 N. Y. 554); where there was a mistake in a message ordering stock sold and other stock purchased (*Rittenhouse v. Indiana, etc. Tel. Co.* 1 Daly, 474; 44 N. Y. 268); where wheat was ordered to be purchased at "22" and the message, as delivered, said "25" (*De Rutte v. New York, etc. Tel. Co.* 1 Daly, 547); where the name of the receiver was misspelled (*Lausberger v. Magnetic, etc. Tel. Co.* 32 Barb. 580),—in all these cases the actual damages sustained by the parties were recovered.

But, on the other hand, where the company is at fault, it cannot be

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held liable where this fault is not the proximate cause of the loss. Thus, A. telegraphs to B. to send him \$500. The message, as negligently delivered, asked for \$5,000. In accordance with the request, B. sent \$5,000, which A. absconded with. It was held that the company was not responsible at the suit of B. *Lowery v. Western Union Tel. Co.* 60 N. Y. 193. And see *Western Union Tel. Co. v. Meyer*, 61 Ala. 153. And uncertain and contingent profits are not recoverable. *King-horne v. Montreal Tel. Co.* 18 U. C. Q. B. 60; *Lane v. Montreal Tel. Co.* 7 U. C. C. P. 73; *Beaupre v. Pacific, etc. Tel. Co.* 21 Minn. 155; *Bress v. United States Tel. Co.* 45 Barb. 275; *Hibbard v. Western Union Tel. Co.* 33 Wis. 558; *Western Union Tel. Co. v. Graham*, 1 Col. 280; *Squire v. Western Union Tel. Co.* 98 Mass. 232; *True v. International Tel. Co.* 60 Me. 9; *McCall v. Western Union Tel. Co.* 7 Abb. N. C. 151. Nor are any damages recoverable where the terms of the message, as delivered to the operator, are obscure, and are so unintelligible to him that he is unable to understand its import or its importance. But this rule is subject to the qualification that the agents of a telegraph company will be held to possess such experience as to enable them to comprehend what might be unintelligible to others; in other words, the employees of telegraph companies will be presumed to be acquainted with the language of merchants, and the forms used by business men in telegraphing their orders, replies and contracts. *Thomp. Neg.* 857, and cases cited.

CONNECTING LINES.—The decisions are not uniform as to the company's liability for an injury on a connecting line. Under the English rule, applicable to carriers of all kinds, the first carrier alone is liable. In some of the American states the rule is different, and the carrier on whose line the loss occurs may be sued. On the other hand, a telegraph company receiving a message directed to a place beyond its lines, and receiving payment for the extra service, is liable for the negligence of any connecting line, for they are its agents in the service, and not the sender's. *De Rutte v. Albany, etc. Tel. Co.* 1 Daly, 547.

WHO MAY BRING ACTION.—In England, the recipient of a message cannot maintain an action against the company for damages caused by its negligence. The obligation on the part of the company is one of contract with the sender, to which the receiver is not a party, and under which he can claim no rights. In the United States this technical rule is not recognized, but a telegraph company may be sued by the party to whom a message is addressed for damage resulting from its neglect. *New York, etc. R. Co. v. Dreyburg*, 35 Pa. St. 298; *Ehwood v. Western Union Tel. Co.* 45 N. Y. 549; *Rose v. United States Tel. Co.* 6 Rob. 305; *Western Union Tel. Co. v. Carew*, 15 Mich. 525.

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(Eastern District of Missouri. December, 1882.)

1. LIEN FOR SUPPLIES FURNISHED AT HOME PORT.— A party furnishing a vessel with supplies at its home port on credit is not entitled to an admiralty lien upon the vessel, except where a lien is given by a local statute.
2. ENFORCEMENT OF.— Where a state statute gives a lien for supplies furnished at a home port, a lien for supplies so furnished will be enforced by a court of admiralty, but only when it comes strictly within the terms of the statute.
3. TIME WITHIN WHICH LIEN MUST BE ENFORCED.— Where the state statute prescribes a time within which the lien must be enforced, if at all, the limitation will be recognized by the federal court.
4. WHERE VESSEL IS IN THE CUSTODY OF A STATE COURT.— Where, at the time a libel is filed against a vessel in a court of admiralty, the vessel is in the custody of a state court, the libellant cannot enforce his process by seizure until the custody of the state court ceases.
5. SAME — LIMITATIONS — EFFECT OF CUSTODY OF STATE COURT.— Where a lien for supplies furnished a vessel at its home port was, by the terms of the statute conferring it, only enforceable within nine months after the supplies were furnished, and the vessel to which they were furnished was during the whole of the prescribed period in the custody of a state court, *held*, that the fact of such custody did not enlarge or suspend the operation of the state statute.

In admiralty.

TREAT, *District Judge*.— The libel is for supplies furnished in a home port. Under the state statute a lien existed therefor, to be enforced within nine months. More than nine months passed before the libel was filed. It appears that the defendant vessel was owned by a corporation, whose assets, including the vessel named, had passed into the custody of a receiver appointed by the state court soon after the demand accrued, and that immediately after such custody ceased this suit was instituted, although nine months had elapsed.

Under the decisions in the cases of *The Lottawanna* and *The Edith* this court must hold that supplies in a home port cannot be recognized in admiralty except in strict compliance

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with the terms of the local statute giving a lien therefor. As early as the case of *The Golden Gate* (1857) this court discussed the main propositions involved, supposing that the United States supreme court would depart from the narrow English rule followed in the case of *The Gen. Smith*. As that court had, in the case of *The Genessee Chief*, overruled the English doctrine as to tide-water, it was thought it would also overrule the equally narrow English rule as to home supplies. It has, however, adhered to that narrow rule, and at the same time admitted as maritime demands, cognizable in admiralty, those arising in a home port where the local statute gives a lien therefor, and restricting those demands to the positive terms of the local statutes.

The argument in this case pursues the same line of reasoning often enunciated in this court, but which the United States supreme court has repudiated. It has often been stated in this and in the United States circuit court that the admiralty and maritime jurisdiction of the United States courts could not be enlarged or restricted by state enactments, and hence the latter should be disregarded. At the same time it was stated that supplies in the home port, independent of state statutes, were within federal cognizance. This latter ruling was based on grounds fully presented in the dissenting opinion of Justice Clifford in *The Lottawanna Case*, 21 Wall. 558. The United States supreme court, however, has adopted a ruling to which all inferior courts must conform, no matter what difficulties or seeming injustice may follow. The present case furnishes an apt illustration of some of the difficulties. If the demand constituted a maritime lien enforceable in admiralty, independent of local enactments, then no action of a state court could divest the same. If, at the filing of the demand in the United States court, the vessel was in state custody, the libellant could not enforce his process by seizure, but the seizure could be made so soon as the state custody ceased. The rules of law in this respect have been long settled.

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The apparent inconsistencies urged are that if the demand were a pure admiralty lien, as if for seamen's wages, it would override state process as to priority; but that as it is a demand with a lien declared maritime merely through state statutes, the libellant is in a position where, if he pursues his remedy in the state court, it will be wholly inadequate, and if he resorts to the United States court, under the circumstances, interminable delays and expense will occur, or he will be barred by the limitations prescribed. The state statute recognizes as liens many demands which are not maritime, and if the state court enforces these demands, many of them which are not maritime within the ruling of the United States supreme court will be put on an equal footing with the maritime. If, on the other hand, the maritime lien, recognized only by force of the state statute, is pursued in the admiralty court, then the state statutes as to rules of distribution must be overridden. What, then, shall be the rule of action?

As the law has been pronounced by the supreme court concerning supplies in a home port, difficulties like those now presented may frequently occur. An effort to enforce libellant's demand in the state court would give him only a *pro rata* amount with many maritime demands; but his claim presented in the United States court would give him priority in right. Again: The state court, under the corporation act, had taken possession of all the assets of the corporation, including the defendant's vessels, and consequently such assets in the hands of its receiver were subject to existing maritime liens, and also to statutory liens. Which should dominate? Pure admiralty liens would override mortgages and liens merely statutory, but how stand lien demands which exist only by force of state statutes, yet recognized in *The Lottawanna Case* as maritime and enforceable in admiralty? It is impossible to avoid the difficulties presented, in the light of authoritative rulings. The state statutes do or do not affect the jurisdiction of admi-

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rality courts. If they are to be received as operative, where is the dividing line? If operative only as to such liens created as are maritime in their nature, which, but for the state statute, would be discarded, how is it that a United States court acquires jurisdiction through a state statute alone, in admiralty, and then repudiates all that statute contains except what may be considered as maritime, cognizable in admiralty under the United States constitution and laws? The demand is or is not a maritime lien, cognizable in admiralty courts; yet the United States supreme court has held that resort can be had to state laws to eke out or give jurisdiction, which otherwise would not obtain.

Without attempting to solve the many difficulties resulting from the rejection of the true maritime rule as to home supplies, it must suffice to state that the case falls within the doctrines laid down in the cases of *The Lottawanna* and *The Edith*. This suit was instituted for a maritime lien originally existing by force of the state statutes, which lien ceased at the expiration of the prescribed nine months. The fact that the lien could not have been previously enforced by seizure, in consequence of the custody of the state court, does not enlarge or suspend the operation of the state statute. The lien expired before the suit was brought.

The exceptions are sustained and the libel dismissed, at cost of libelant.

Given Campbell, for libelant.

James Taussig and *George A. Madill*, for claimants.

Northern Ins. Co. v. St. Louis & S. R'y Co.

NORTHERN INS. CO. v. ST. LOUIS & S. R'y CO.

(*Eastern District of Missouri. March, 1883.*)

1. JURISDICTION OF CIRCUIT COURT—ACT OF MARCH 3, 1875.—An assignee of a non-assignable cause of action cannot maintain a suit thereon before a circuit court where his assignor could not have done so.
2. SAME — ASSIGNMENT OF CAUSES OF ACTION ARISING ON TORTS.—The act of 1875 does not abrogate the common law rule as to assignment of causes of action arising on torts.

Demurrer to the petition.

TREAT, *District Judge*.—The only question to be considered is jurisdictional. Certain persons insured by a fire risk sustained a loss through the alleged wrongful acts of the defendant; their underwriter paid the loss and took an assignment of their rights of action against the defendant. The assignors (the persons insured) were and are citizens of the same state as the defendant. The sole question is whether the plaintiff, as assignee of such a cause of action, by subrogation or otherwise, can sue in a United States court in its own name, the assignee being a citizen of this state.

It is not proposed to review the many cases decided under the acts of 1789 and 1875, but merely to state generally the views held by this court. Under the act of 1789, it is conceded, no assignee or assignor to the use of the assignee of a cause of action like that under consideration could maintain the right of action in a United States circuit court. Under its provisions no assignee could proceed in a United States circuit court when the assignor could not, excepting only "in case of foreign bills of exchange." So stood the law until the act of 1875, whereby the jurisdiction was greatly enlarged as to citizenship of the parties, yet containing this provision: "Nor shall any circuit or district court have cognizance of any suit founded on contract in favor of

an assignee, unless a suit might have been prosecuted in such court to recover thereon if no assignment had been made, except in cases of promissory notes negotiable by the law merchant and bills of exchange."

The act of 1789 gave jurisdiction when a suit was between a citizen of the state where it was brought and a citizen of another state, with a proviso that no cognizance should be had of "any suit to recover the contents of any promissory note or other chose in action in favor of an assignee, unless a suit might have been prosecuted in such court to recover said contents if no assignment had been made, except in cases of foreign bills of exchange." The proviso in the act of 1875 so far enlarged the act of 1789 as to embrace all negotiable promissory notes under the law merchant, and all bills of exchange.

The history of judicial decisions, from the case of *Swift v. Tyson*, 16 Pet. 1, down to *Goodman v. Simonds*, 20 How. 343, and illustrated by the many cases of municipal bonds, will serve to show the scope of the enlarged provisions of the act of 1875, so far as commercial paper is concerned. It is contended that inasmuch as by the act of 1789 jurisdiction was conferred, with the exceptions therein enumerated, of all cases between a citizen of the state where brought and a citizen of another state, therefore the jurisdiction by the act of 1875 was enlarged to cover all controversies between citizens of different states, with only the exception stated in the proviso of the latter act.

In the act of 1789 one of the parties must have been a citizen of the state where suit was brought, and in the act of 1875 difference of citizenship was alone necessary. In the act of 1789, despite citizenship, no suit could be brought "in favor of an assignee" on a promissory note or chose in action, except, etc. As the law then stood, and as it now stands, in many states, the assignee, in ordinary choses in action, cannot sue in his own name, but must sue in the name of the assignor, to his own use. In some states that

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rule has been changed so that the real party in interest may sue.

Was it intended by the act of 1875 to abrogate the rule as to the assignments of causes of action on torts, so that an assignee thereof might sue in a United States circuit court, while restricting assignees of choses in action under contracts to a more stringent rule? It is true, the formal language of the act of 1875 is less restrictive than that of 1789, but it is also true that many states by express enactment enforce the common law rules as to the non-assignability of actions for torts. Where they are non-assignable, only the person wronged can sue, and jurisdiction will be determined accordingly. Such is this case. The Missouri statute, in permitting the real party in interest to sue, declares that the statute "shall not be deemed to authorize the assignment of a thing in action not arising out of contract." Hence there could not, *a fortiori*, be an assignment of the tort in question whereby the assignee could maintain a suit in its own name in the United States court. 74 Mo. 521; 13 Wall. 367.

There may possibly be cases elsewhere under assignments of torts where the assignee can sue in his own name. Under such a state of the law the question might become doubtful where the two acts in question are to be construed. The act of 1789 covered cases where the assignee had to sue in the name of the assignor. The manifest intent of the law was to leave such parties to the forum where their causes of action arose. Was it, then, the purpose of the act of 1875 to permit assignees of all causes of action, unless founded on contract, to pursue their supposed rights in federal courts in their own names, whether the causes of action were or were not assignable? It is said some circuit courts, laying special stress on the omission in the act of 1875 of the general words "choses in action" contained in the act of 1789, have intended that assignees of *all* rights of action, except those founded on contracts, may now proceed in the United

States courts when difference of citizenship exists. If there are such cases, they fail to observe the general doctrines as to "choses in action," and the common law right to sue thereon, and the manner in which such suits should be brought. But no case cited goes to the extreme claimed by plaintiff. If suits are brought, as under the old rule, in the name of the assignor, no difficulty occurs, for the act of 1875 is, in this respect, in full accord with the act of 1789. It is only on the hypothesis that an assignee may sue in his own name, as permitted by many state statutes, that a difficulty arises.

It is, however, to be supposed that congress had in view the general law, and not the special practice acts of one or more states. Hence, if an assignee, claiming the right to sue in his own name, brings suit when his assignor could not do so, his right so to do cannot be upheld, irrespective of the rule as to collusive proceeding. 104 U. S. 209. Especially must this be the case when the Missouri statute governs. It was not the purpose of the acts of congress to change the nature of obligations and to declare those assignable which, under the local laws, were non-assignable. Those acts were not designed to create or transfer or legislate upon rights of parties, but only, within the limits prescribed, to permit parties thereto to have their controversies heard in United States courts. When a chose in action is by the local law assignable, and suit is brought by the assignor to the use of the assignee, or by the assignee, then the jurisdictional question is the same as under the act of 1875 except as to promissory notes, etc.

The act of 1875, in referring to suits founded on contracts, does not intend to change the rule in the act of 1789 by distinguishing between choses in action founded on contract, so as to exclude them, and so-called choses in action founded in tort, which are generally non-assignable, so as to admit the latter. Any other view would be subversive of the entire spirit of the federal statutes, and even call for such an inter-

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pretation of them as would make non-assignable causes of action assignable in quality and for jurisdictional purposes,—an interpretation inconsistent with all sound rules of law as heretofore understood and enforced. The causes of action sued on are, under the Missouri statute, non-assignable, and therefore the plaintiff cannot maintain this suit. Demurrer sustained.

McCREARY, *Circuit Judge*, concurs.

F. M. Estes, for plaintiff.

Noble & Orrick. for defendant.

DAHLMAN v. JACOBS and others.

(*Eastern District of Missouri. March, 1883.*)

1. EQUITY — CREDITOR'S BILL.— A creditor at large, who has not established his demand at law, cannot maintain a suit in equity, either to set aside a conveyance executed by an insolvent debtor, or obtain a decree that such conveyance shall stand for a general assignment, under the state statutes, for the benefit of all such debtor's creditors.
2. SAME — REMEDY AT LAW.— A court of equity has no jurisdiction, even where the demand has been duly established, if the plaintiff can obtain a full, complete and adequate remedy at law.

In equity. Demurrer to bill.

This is a suit brought by Max Dahlman against Joseph M. Hayes, Amelia Jacobs, and Henry Jacobs, her husband, to have a certain instrument executed by the two last-named defendants held and decreed to be and operate as a deed of assignment for the benefit of the creditors of said Amelia Jacobs, under the laws of the state of Missouri, and for other relief. The bill states that said instrument purports to be a mortgage of all the separate estate and property of said Amelia Jacobs, and to have been executed for the pur-

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pose of securing a debt due from her to Joseph M. Hayes, the mortgagee, and alleges that at the time said instrument was executed Mrs. Jacobs was carrying on business in St. Louis under the name of A. Jacobs, and had a separate estate; that she was insolvent, and at the time said instrument was executed was indebted to other creditors besides said Hayes, among whom was the defendant, to whom she owed the sum of \$1,442.82, as appeared by an itemized account therewith filed. The only question decided by the court was as to its jurisdiction.

Patrick & Frank, for plaintiff.

D. Goldsmiths, for defendants.

TREAT, District Judge.—A general demurrer has been interposed, which involves two questions: *First*, whether a creditor at large can maintain the bill, either to set aside defendants' conveyance or to decree that it shall stand for a general assignment for the benefit of all the creditors; *second*, if the plaintiff has the proper standing, whether the conveyance in question falls within the provisions of the Missouri statute as to assignments.

The counsel have exercised extraordinary diligence in presenting and collating cases on the second point. The questions on that point, if they had to be considered, would involve a review of the many decisions cited, especially those of the supreme court of Missouri, on the Missouri statute. The plaintiff, however, is, by the express averments of his bill, a creditor at large, without a lien or trust upon the property in question, and hence falls within the well-settled rules that his demand must first be established at law; and it must also appear that he has not full, complete and adequate remedy at law, before he can invoke proceedings in equity. His account is an open one, and it may be, if tried at law, where it should be, his demand would fail, or, if not in its entirety, to an extent that would reduce

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the same below the jurisdiction of this court. This court cannot be driven, *first*, to ascertain whether he has a legal demand which belongs to common law courts, and thus, having usurped common law jurisdiction, proceed, after giving what is equivalent to a common law judgment, to enter upon the other or equitable inquiry involved. Without reviewing what are elementary authorities on this point, it must suffice to refer to *Case v. Beauregard*, 99 U. S. 119, and 101 U. S. 688.

It is obvious that the plaintiff in this case has full redress at law, if he has any demand against the defendants. It is sufficient, however, for the purposes of this demurrer, that he has not, under the allegations of his bill, a cause of action cognizable in equity. The demurrer will be sustained.

McCABY, *Circuit Judge*, concurs.

GREENWALT v. DUNCAN and others.

(*Eastern District of Missouri. March, 1883.*)

1. EQUITY — JURISDICTION IN SUITS TO REMOVE CLOUDS UPON TITLES. — A suit to remove a cloud upon a title cannot be maintained in a court of equity, where the plaintiff has a full, complete and adequate remedy at law.
2. SAME — CROSS-BILL — RIGHTS OF DEFENDANT. — The defendant in a suit to remove a cloud from a title to property in the plaintiff's possession has a right to file a cross-bill urging a superior title in himself, and to be fully heard; and if his title is found to be better than the plaintiff's, he is entitled to a decree in his favor, settling the whole controversy.
3. SAME. — Where a cross-bill is filed it should contain adequate averments to show title in the defendant.
4. SAME — HOW DEFECTS SHOULD BE TAKEN ADVANTAGE OF. — Where the cross-bill does not contain the proper averments, the defect should be taken advantage of by demurrer.

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In equity. Pleas and demurrer to a cross-bill.

This is a suit to quiet the title to certain real estate situated in the city of St. Louis, by removing a cloud therefrom, caused, as alleged, by the execution to the defendants' grantor of a certain tax deed.

E. Cunningham, Jr., for complainant.

E. R. Mark, for defendants.

TREAT, *District Judge*.—The unquestioned rule obtains in all cases in equity to remove a cloud upon a title that it must be clear that plaintiff has not a full, complete and adequate remedy at law; otherwise he will be remitted to his common law remedy. This, under the constitution of the United States, the acts of congress, and repeated decisions of the United States supreme court, is an inflexible rule. Mere questions as to conflicts of supposed legal titles can ordinarily be decided in actions of ejectment.

Plaintiffs' right in this case to sue in equity rests solely on the fact that, being in possession, they cannot sue the adverse parties at law. They set out in their bill with great fullness the pretended title of the defendants as well as their own derivative title. The defendants file a cross-bill designed to be defensive in part, but to a large extent affirmative. The purpose of the pleader is to urge the superiority of defendants' title and to have a decree settling the whole controversy. To the cross-bill two pleas have been interposed and argued.

The *first* is that, inasmuch as the cross-bill does not aver possession in the defendants, their remedy as for affirmative relief is at law; that is, if persons are not in possession of real estate to which they have paramount title, they should be driven to their action of ejectment. That plea rests upon a misapplication of the general rule stated. The plaintiffs are in court for the sole reason that they are in possession, and therefore have brought in the defendants, who are out of

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possession, to answer to the demand made. The defendants, being thus in court at plaintiffs' instance, have a right, by answer or cross-bill, to be fully heard, and not to be denied a hearing because the sole basis, jurisdictionally, of plaintiffs' bill is true. The defendants are here because they are out of possession, and to say that, therefore, they shall not be heard would be a strange perversion of the rule, and entirely subversive of the only ground on which plaintiffs proceed in equity. The first plea is overruled.

The *second* plea looks to the averments of the cross-bill concerning the title set up affirmatively by the defendants. The controversy, as fully disclosed by the plaintiffs in their original bill, pertains to an alleged tax title. All the requirements of the statutes are set out, and the particulars wherein it is alleged said statutes were not observed, by reason of which defendants' title is invalid. The cross-bill avoids meeting said allegations, and avers in the most general terms that defendants have a collector's deed. It is not disclosed under what direct authority or preliminary proceedings or judgment said collector acted. In other words, there are in the cross-bill no adequate averments to show title in the defendants. This defect should have been taken advantage of by demurrer. The court overrules the plea, but, treating it as a demurrer, gives the defendants leave to amend.

It should be remarked that the form of both pleas is objectionable in referring the court by lines and pages of the cross-bill to what is stricken out, instead of stating the subject matter. The court should not be driven to the task of hunting out by folios, lines and pages, in voluminous pleadings, the various facts intended to be assailed, and thus determine as *ex mero motu* what the objection may possibly suppose exceptionable, or what it can detect so to be. The points already presented as to the second plea cover the demurrer, which is sustained.

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FISHER and another v. KELSEY and another.

(Eastern District of Missouri. April, 1883.)

1. **LIABILITY OF INNKEEPERS FOR THEFT OF MERCHANDISE FOR SALE**—R. S. MO. § 5786.—Section 5785 of the Revised Statutes of Missouri does not apply to articles of gold manufacture kept by a guest for sale.
2. **SAME**—R. S. MO. § 5786.—Where a statute provides that no innkeeper shall be liable for the loss of any merchandise for sale or sample belonging to a guest, unless the guest shall give him written notice of having such merchandise for sale or sample in his possession after entering the inn, and furthermore provides that the innkeeper shall not be compelled to receive guests with merchandise for sale or sample in their possession, a notice in *writing* is absolutely necessary to fix an innkeeper's responsibility, and he waives nothing by admitting a guest whom he knows has merchandise for sale or sample in his possession.
3. **SAME—COMMON LAW LIABILITY**.—Whether the common law liability of innkeepers extends to merchandise for sale or sample, *quære*.

This is a suit to recover the value of a large quantity of jewelry stolen from a salesman in the plaintiffs' employ, who was stopping at the time at a hotel kept by the defendants, known as the Planters' House. The jewelry was stolen from the salesman's room, where it was kept for sale, by a person unconnected with the house. Evidence was introduced by the plaintiffs tending to show that the defendants knew the occupation of the plaintiffs' salesman when they received him as a guest, and knew that he had jewelry for sale in his possession. There was no evidence, however, that any written notice was given by the salesman that he had any merchandise for sale with him. Evidence was introduced on behalf of the defendants, tending to show that the requirements of section 5785 of the Revised Statutes of Missouri had been fully complied with as to posting notices, etc.

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The Missouri statutes upon the subject of the liabilities of innkeepers is as follows, viz.:

"Sec. 5785. No innkeeper in this state who shall constantly have in his inn an iron safe, in good order, and suitable for the safe custody of money, jewelry and articles of gold and silver manufacture, and of the like, and shall keep a copy of this chapter printed by itself in large, plain English type, and framed, constantly and conspicuously suspended in the office, bar-room, saloon, reading, sitting and parlor room of his inn, and also a copy printed by itself in ordinary-sized, plain English type, posted upon the inside of the entrance door of every public sleeping room of his inn, shall be liable for the loss of any such articles aforesaid, suffered by any guest, unless such guest shall have first offered to deliver such property lost by him to such innkeeper, for custody, in such iron safe, and such innkeeper shall have refused or omitted to take it and deposit it in such safe for its custody, and to give such guest a receipt therefor.

"Sec. 5786. No innkeeper in this state . . . shall be liable for the loss of any merchandise for sale or sample belonging to a guest, unless the guest shall have given written notice of having such merchandise for sale or sample in his possession after entering the inn, nor shall the innkeeper be compelled to receive such guest with merchandise for sale or sample; but innkeepers shall be liable for the losses of their guests, caused by the theft of such innkeeper or his servants, anything herein to the contrary notwithstanding." Laws of 1872, p. 55, § 1.

After the question as to the proper interpretation of said clauses of the Missouri statutes had been argued, and before charging the jury, the court said, per McCraby, *Circuit Judge*:

The act of 1872 brings in an entirely new element. Previous acts required the posting up of these notices in the public rooms and sleeping rooms of a hotel, but there was nothing in those acts prior to 1872 that applied to the case

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of a traveling merchant, or a man going about the country with merchandise for sale, and who came into a hotel with merchandise for sale, and there engaged in the business of selling the merchandise itself, or selling by sample.

We all know that this mode of disposing of merchandise has, of late years, become a great business. I suppose that a very large proportion of the selling of merchandise of all descriptions is now done by this method of sending agents throughout the country, who carry with them samples of goods they propose to sell, or, in some cases, carry the goods which they propose to sell, where the articles are not too cumbersome. Where it is convenient for them to do so, they will carry the articles themselves; otherwise, they carry samples and sell by sample.

Now it is evident that the liabilities and responsibilities of innkeepers would be very great indeed, if they are held liable for all the goods, under this system of transacting commercial business, that are brought into the hotel. Whether they would be liable — whether innkeepers would be liable at common law in such a case as this — is, to my mind, a very doubtful question. I have always understood that the liability of an innkeeper was substantially that of a common carrier. It extends to the ordinary baggage that a traveler carries with him. Of course, what is baggage is a question depending very much upon circumstances, the condition of the person who is traveling, his station in life, and all that. But I have never understood that the liability of an innkeeper could be carried at common law so far as to make him responsible for merchandise a traveler may place in his room at the hotel for purposes of trade and traffic. That may be the law; I will not say it is not, because it does not arise now; but if it be the law, or be the common law, it is perfectly apparent that the legislature of Missouri has undertaken to change it, and has done so by this act of 1872, which, as I have said, is an independent statute, a new provision, not a mere modification or change of any of the

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provisions of the old statute, but a new regulation, applying to a different state of things. It declares that "no innkeeper in this state shall be liable for the loss of any baggage or other property of a guest caused by fire not intentionally introduced by the innkeeper or his servants." That has nothing to do, of course, with this case, but it serves to show that the legislature introduced into the laws on this subject a new and independent provision:

"Nor shall he be liable for the loss of any merchandise for sale or sample belonging to a guest, unless the guest shall have given written notice of having such articles for sale after entering the inn, nor shall the innkeeper be compelled to receive such guests with merchandise for sale or sample. But innkeepers shall be liable for losses of their guests caused by the theft of such innkeeper or his servants, anything herein to the contrary notwithstanding."

Now, if I understand the force and effect of that statute, it is that the traveler who comes to a hotel with merchandise for sale or sample, and goes into a room in a hotel for the purpose of exhibiting and dealing in it, must give to the innkeeper written notice that he has such property with him in order to make the innkeeper liable for it. That being so, there being no evidence here at all tending to show that any such written notice was given, that is the end of this case.

We are asked to say that the statute does not require written notice. The court could not say that. It is not for the court to say what the purpose of the legislature may have been; but it is fair to presume that the intention was to have the evidence of such notice in such shape that it could not admit of any question of doubt. The reason for it, I think, is tolerably apparent. While the innkeeper may, in some cases, know what his guest has, as a general rule he will not know. He may know that he has merchandise, but may not know what it is. He may not know what its character or quality is; he may not know that he has merchandise at all; and very great difficulties would arise, as a

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matter of course, if it was left a question of whether he had notice of any kind.*

But, whatever the reason may have been, the legislature has said very plainly that it must be written notice; and, even if this was to be construed as a statute in contravention of the common law, and therefore to be strictly construed, we cannot construe it by striking out anything in it. It must be read as it stands.

With regard to the question whether there is any evidence of waiver here that ought to go to the jury, I have no difficulty at all upon that subject. The innkeeper under that act waives nothing because he knows that the guest has merchandise. He knows that he has the merchandise, but he also knows that if the guest intends to hold him liable he must give him the notice. The innkeeper waives nothing if he does not fail to do his duty under the act. If he observes his obligation as prescribed by the act, it certainly cannot be held that he has waived anything.

This is an interesting and important case, and I apprehend that you will want to have the question settled by the supreme court, and I shall be very glad to have you do so; but with the view I hold I must give the instructions asked.

J. B. Woodward and Krum & Krum, for plaintiff.

Noble & Orrick, for defendant.

McCARY, *Circuit Judge (charging jury orally).*— At the time in the petition mentioned as that at which the matters complained of are stated to have occurred, no innkeeper in the state of Missouri was liable for the loss of any merchandise, for sale or sample, belonging to a guest, unless the guest shall have given him written notice of having such merchandise for sale or sample in his possession after entering the inn, unless the loss to the guest was caused by the theft of the innkeeper or his servants; and inasmuch as the evidence here shows that these goods were kept in the hotel

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for sale or sample, and there is no evidence tending to show that there was any such written notice* as the statute requires, and no evidence tending to show that the theft was caused by the innkeeper or his servants, it follows that you must return a verdict for the defendant, and this you can do without leaving your seats.

 McMILLAN and others v. CONRAD.

(*Eastern District of Missouri. May, 1883.*)

1. **PATENTS — PROVISIONAL INJUNCTION — BOND.** — In a suit brought by a patentee, alleging an infringement and only claiming a royalty or license for the use of the patented device, a motion for a provisional injunction *simpliciter* will not be granted of course, even where the patent alleged to have been infringed has been held valid in cases against other infringers; the defendant will be held only to give bond to the plaintiff to secure him to the full extent of his demand, with costs, etc.
2. **SAME — TEST CASE — ABANDONMENT OF APPEAL.** — Where a patentee brought different suits against A., B., and C., for an alleged infringement of his patent, and the suit against A. was made a test case and went to final hearing, and the patent was held valid and A. held to be an infringer, and A. appealed, but abandoned this appeal at the patentee's instance for a consideration, and the cases against B. and C. were dismissed, and C. continued to use the patented device, *held*, in a suit subsequently brought against C. for infringing the same patent, that he was not bound by the decision in the case against A.

Motion for a provisional injunction for the infringement of a patent.

TREAT, *District Judge.* — This is a motion for a provisional injunction. Counsel have been heard at great length. The court stated that when the patentee only claimed a royalty or license fee for the use of his device, the rule here was to require the defendant to give the plaintiff a bond to secure

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plaintiff to the full extent of his demand, with costs, etc., when the defendant contested the demand.

It is true that the case before the court has many novel aspects. Some seven or more years ago cases were brought in this court against several defendants for an alleged infringement of the patent in question. One went to final hearing, and it was held that the patent was valid, and that the defendant in that case infringed. An appeal was taken. That appeal, it seems, was abandoned, at the instance of the plaintiff, for a consideration named. It was understood that the case heard was a test case. The other cases, including one against this defendant, were dismissed. Since that time, it may be, this defendant has continued to use the patent device. Had he not a right to suppose that the plaintiff's demand against him was abandoned?

It is said that more than a hundred cases have been instituted against as many parties, in some of which, on final hearing, the patent has been upheld, and in others provisional injunctions granted; therefore this defendant must be taken out of the general rule, for he was bound to know the course of litigation. But he had been a party litigant and discharged. He had no further interest directly in the controversy; was not bound to attend to or watch controversies between other persons. It was his duty to attend solely to his own affairs.

It is urged that if a patentee has to pursue in separate suits each infringer, the value of his patent is lost through accumulated costs, expenses, etc. On the other hand, the defendant in a specific case is no more bound by the decree in another case than is the plaintiff. If the one hundred cases suggested had been decided against the plaintiff, could the defendant avail himself of them on this motion? The rights of each must be determined by the case presented. It might be wiser, and so this court thinks, if the law made proper provision for determining, once for all, the validity of a patent when assailed. But the law must be taken as

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found, and each defendant held to have an independent right to contest the validity of the patent. It may be that infringers persecute a patentee by contesting his right *ad infinitum*, and it may also be that a patentee without merit persecutes *ad infinitum* the public at large. There are always two phases to such suggestions, neither of which should control the judgment of the court, although the facts and circumstances presented might be persuasive in framing a provisional order.

It must be deemed conclusive on this motion that the decree heretofore rendered established the validity of the patent; that an appeal was taken, which, for reasons satisfactory to the specific parties, was dismissed; that thus a test case was never determined; that the present defendant was before the court as defendant then; that the case against him was dismissed; and that whatever has been held elsewhere in other cases to which he was not a party cannot properly affect him at this stage of the inquiry. He may or may not be an infringer, wilful or otherwise; it may or may not be that when, as against him, the case is heard the patent will be held void, or that he has infringed. Hence the various matters extraneous to this case are cognizable only to show that a provisional order is proper in some form. Nothing appears to vary the usual course; therefore a bond for \$1,000 will be required.

Paul Bakewell and William Bakewell, for complainants.

Given Campbell and R. H. Parkinson, for defendant.

MANVILLE v. KARST.

(Eastern District of Missouri. May, 1883.)

1. CORPORATIONS — STOCKHOLDERS — DOUBLE LIABILITY CLAUSE — JUDGMENT OBTAINED BY COLLUSION.— Where A., a stockholder in an insolvent bank, became liable in the sum of \$1,200, under a double

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liability law, to the creditors of the bank, and was sued for that amount by B., an admitted creditor, and A. a few days thereafter, and before judgment could be had in the ordinary course, agreed with C. that, if the latter would buy up claims against the bank to the amount of his liability, he would confess judgment in his favor, and C. accordingly bought up claims to that amount at a large discount, from a stockholder in said bank, and A. confessed judgment in his favor for the full amount of the claims, and paid the same, *held*, that such judgment and satisfaction could not be pleaded in bar to the suit brought by B.

Action against stockholder of insolvent bank.

TREAT, *District Judge*.—The defendant admits that, as a stockholder in the insolvent bank at Belleville, he became liable in the sum of \$1,200, under the double liability law, to the creditors of that bank. The plaintiff, being an admitted creditor, sued defendant accordingly. A few days thereafter, and before judgment could be had in the ordinary course, a friend of the defendant bought up outstanding claims against the bank at a large discount, and, through confession of judgment by defendant, obtained full payment of the sum of \$1,200. This latter judgment, and satisfaction thereof, are pleaded in bar to the present suit. It appears that both the defendant and his friend were fully aware of the pendency of this suit, and they supposed that the subsequent purchase of outstanding indebtedness, with a confession of the judgment thereon, would operate not only as a preference of one creditor over another, but also in enabling the friend, through the defendant's co-operation, to defeat plaintiff's rights and possibly make a speculation to the injury of this creditor, even if there were no understanding that defendant was to share in the speculation.

The supreme courts of Missouri, and seemingly of Illinois, have held that a stockholder, when sued, or before suit, can pay outstanding demands, and, having surrendered them for cancellation, can plead that fact in bar to the extent of the amount so bought and canceled. The reasons given in those

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cases for the conclusions reached are purely technical and not satisfactory, even on technical grounds, for they ignore the general spirit and purpose of the law of double liability, and leave the door wide open for fraud. If this court is at liberty to go behind those decided cases, it would certainly agree with the appellate court of the fourth district of Illinois,—*Gauch v. Harrison* (Wall, J.),—in which sounder views are expressed — those more consonant with the purposes of the statute and the rights of parties, and even with technical rules.

If a stockholder cannot set off the debts of the corporation to him, in order to defeat his liability, why should he be permitted through a friend to defeat a just claim against himself, when sued, by confessing judgment in favor of that friend, prior to the possible time when the creditor originally suing could obtain judgment on a valid demand, except by consent?

In the absence of proof that the confessed judgment was in whole or part for the defendant's benefit, or that the same was collusively contrived to defeat the plaintiff, the technical rulings referred to might be conclusive, although no adjudged cases cover fully the facts and circumstances under consideration.

The salient facts are that the defendant was sued by this plaintiff; that he conversed with his friend on the subject; that they were satisfied of his liability; that it was understood defendant would confess judgment in favor of his friend if he bought up demands against the bank; that thereupon demands were bought up at a heavy discount, judgment confessed, etc. Those demands were bought from a well known stockholder who could not use them in his own case.

It may be that the technical rulings of the Missouri and Illinois supreme courts might lead to the extent claimed by defendant, but the views of Judge Wall are far more consistent with sound law, right, reason and strict justice. They

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commend themselves fully to the judgment of this court. The result is that judgment will have to be entered in favor of plaintiff for the sum of \$1,200.

The cases especially referred to are *State Savings Ass'n v. Kellogg*, 63 Mo. 540; *Manville v. Roever*, 11 Mo. App. 317; *Buchanan v. Meisser*, Ill. Sup. Ct. (MS.); *Gauch v. Harrison*, Fourth App. Ct. Ill. (MS.); *Jones v. Wiltberger*, 42 Ga. 575; *Cole v. Butler*, 43 Me. 141; *Thomp. Liab. Stockh.* §§ 424, 425.

It is not to be considered that this court admits that the decisions of the supreme court of Illinois go to the extent claimed by the defendant, but merely that, if they do, this court follows, as more persuasive, the views of Judge Wall heretofore referred to. Were any other views to obtain than those here indicated, the double liability clause would be comparatively futile, for a stockholder could, at pleasure, defeat the rights of a creditor pursuing him, by securing the intervention of a friend, or by transferring his claims which he could not use as a set-off, and have them made the basis of a suit against himself, whereby the obligation imposed on him by law would be defeated.

Afterwards, on motion for new trial, the following additional opinion was delivered:

TREAT, *District Judge*.—Inasmuch as there can be no review in this case the most careful consideration has been given to the law, facts and circumstances involved. As intimated in the opinion heretofore rendered, many of the cases cited rested more on technical than on meritorious considerations. If the whole subject were *de novo* before this court, conclusions might be reached as to some aspects of like cases differing from those quoted.

If a stockholder, under a double liability clause, cannot escape his responsibility, as decided elsewhere, by a set-off of the corporation's indebtedness to him, why should he be

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permitted to transfer the same to another stockholder, after his liability is fixed, or to a third person, whereby his relationship or obligations as stockholder become virtually changed so far as said indebtedness is concerned?

It is said if a stockholder buys indebtedness of the corporation, and turns the same in as payment of his stock, he is discharged *pro tanto*, no matter what the discount on said purchase. If that be so, then the stockholders of an insolvent corporation enter upon a race of diligence, in the course of which not only other stockholders, but also other creditors, may suffer. If, for instance, the assets of the corporation, of which the stockholder's liability is really a part of the principal, amount merely to ten per cent. of the indebtedness, why should not each creditor share equally? If, on the other hand, one creditor, through diligence, obtains priority of right, why should the defendant stockholder be rigidly held to the priority obtained? Why should he, after suit brought, whereby notice is given to him, not be held to the payment of the specified demand? If he can, before charged with notice from a creditor, pay or buy an outstanding demand against the corporation, and receive credit therefor, and, on the other hand, if his liability is fixed, on notice given, so as to exclude subsequent purchases and payments, why is not such liability definitely fixed when suit is brought against him and service had? What more potent notice is known to the law?

If, then, after such notice of the plaintiff's claim, he chooses by the hand of a friend, through confession of judgment, to pay the amount of his liability as stockholder to a third person, should such a transaction be upheld, whereby a fraud is necessarily worked on the original plaintiff? It is said that the institution of the suit works no lien on the fund, and it has been so held, and, consequently, the technical rules as to liens cannot obtain. Still, notice given, it is held, fixes rights of priority. By whatever technical terms the respective rights are designated, it is clear that,

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when suit was brought by plaintiff and service had on the defendant, the latter could not defeat plaintiff's right of recovery by confessing judgment in favor of another person, friendly or otherwise, who subsequently instituted a suit on an understanding that judgment would be confessed.

It is well known that some of the decided cases intimate that such a course is allowable; but, as has heretofore been said by this court, if the rule be otherwise than as laid down in this case, then the door is opened wide to fraud, and the statute for double liability is futile.

It requires very little acquaintance with ordinary matters to know that in cases like the present, if any other rule is to prevail, double liability of stockholders may be easily evaded. Generally, those conversant with the corporation affairs would know of, and could buy, outstanding indebtedness to a sufficient amount, possibly at a heavy discount, to wholly discharge the liability of stockholders, leaving general creditors remediless.

The motion for new trial is overruled.

E. Cunningham, for plaintiff.

C. C. Pearce, for defendant.

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(*Eastern District of Arkansas. April, 1883.*)

1. **FRAUDULENT CONVEYANCE — ATTACHMENT.**— Facts stated upon which an attachment was sustained, on the ground that defendant had disposed of his property to hinder and delay his creditors.
2. **MORTGAGE — CROPS TO BE GROWN.**— In Arkansas, crops to be grown, may be mortgaged, and the lien attaches as soon as they are produced.
3. **SAME — DESCRIPTION OF PROPERTY.**— A mortgage which described the property mortgaged as "thirty bales of good lint cotton, the first picking of our crop of 1882, to average four hundred and fifty pounds each," describes the cotton with sufficient certainty.

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4. UNITED STATES COURT—ENFORCING REMEDIES GIVEN BY STATE LAW.—The remedies given by state law to suitors in the state courts supplementary to writs of attachment for discovery of the debtor's property are applicable to suitors in the federal courts, and may be enforced at law or in equity, according as the state law provides.
5. SAME—DISCLOSURE OF DEFENDANT IN ATTACHMENT SUIT—PAYMENT TO MARSHAL.—When a statute provides that if property to satisfy a writ of attachment cannot be found, the defendant in the writ may be summoned before the court to give information on oath respecting his property, and a defendant so summoned admits on his examination that he has money in his possession legally liable to seizure in payment of his debts, the court may order him to pay the same to the marshal holding the writ, or into the registry of the court, and obedience to such order may be enforced by the usual methods by which courts enforce obedience to their lawful commands.

CALDWELL, *District Judge*.—On the fifteenth day of November, 1881, the defendant, Austin Mitchell, was indebted to Milner & Collins in the sum of \$1,767.69, evidenced by a negotiable promissory note of that date, and, to secure payment of the same, executed a mortgage on that day on certain real estate and "thirty bales of good lint cotton, the first picking of our crop of 1882, to average four hundred and fifty pounds each, to be delivered in Prescott, Nevada county, Arkansas, on or before the first day of November, 1882."

On the nineteenth of December, 1881, Milner & Collins indorsed the note, and transferred the mortgage to the plaintiffs. The defendant did not deliver the cotton at the time and place appointed in the mortgage, and asked and obtained an extension of time for that purpose. He failed a second and third time to deliver the cotton as he had promised and agreed to do. Each time he gave some plausible • excuse for his default, and continued thus to beguile the plaintiffs until he had gathered, baled and sold his whole cotton crop. During this time he also sold all his other property of any value liable to seizure for debt, except the real estate embraced in the mortgage. After selling the

cotton covered by the plaintiffs' mortgage, he admitted he had the proceeds, amounting to \$800, but declined to pay the same, or any part of it, to the plaintiffs unless they would release the mortgage on the real estate. No part of the plaintiffs' debt has been paid, the real estate mentioned in the mortgage is worth less than half the plaintiffs' debt, and the defendant is now insolvent. The plaintiffs sued out an attachment, which the defendant traversed.

The defendant's conduct is attempted to be justified on two grounds: (1) That the mortgage on the cotton was void for uncertainty in the description; and (2) that the note and mortgage were procured from him by fraud, and are without consideration.

Under the act of February 11, 1875, a mortgage on crops to be grown is valid, and the lien attaches when the crop is produced. If it be conceded that the description of the cotton in the mortgage is too uncertain to bind third parties, it was undoubtedly good between the mortgagor and mortgagee. *McClure v. McDearmon*, 26 Ark. 66; *Person v. Wright*, 35 Ark. 169. But the description would seem to be sufficient for all purposes. "That hath certainty enough which may be made certain." The description is "thirty bales of good lint cotton, the first picking of our crop of 1882, to average four hundred and fifty pounds each." There is no difficulty here in identifying the particular bales covered by the mortgage; they are the first thirty picked and baled of the mortgagor's crop of 1882. These bales were capable of identification by the fact that they were the first baled of the crop of that year, and the lien of the mortgage fastened upon them as soon as the process of bailing was completed. *Robinson v. Maudlin*, 11 Ala. 977; *Stearns v. Gafford*, 56 Ala. 544. In the last case cited the court say:

"In the case of *Robinson v. Maudlin*, 11 Ala. 977, the grantor, who was a planter, was indebted to his commission merchants, and to secure them conveyed to a trustee by trust deed 'fifty thousand pounds of the first picking of the

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crop of 1842, then growing on his plantation, to be neatly ginned and packed in bales ready for market; and upon the failure of the planter to pay the note at maturity, the trustee was authorized to take said fifty thousand pounds of cotton and ship the same to the commission merchants, to be sold for the payment of the note,' etc. The question was whether the trust deed conveyed the *title* of the cotton, so as to place it beyond the lien of an execution. It was decided that it did, the court holding that the term 'first cotton which may be gathered,' means of the early, in contradistinction to the late, gathering; and, therefore, when ninety-one bales of the early gathering were ginned and baled, the lien attached, although there was then in the crude state a quantity of cotton not separated from the seed, gathered earlier in the season than that which composed the ninety-one bales.' The proof in this case tends to show that the cotton in controversy may justly be classed as 'of the first cotton that may be gathered,' under the ruling in the case from which we have quoted."

On this question the case of *Person v. Wright, supra*, is not in point. In that case the description was an interest in the mortgagor's crop "to the extent of one five hundred-pound bale." No clue was given by which the bale could be identified, and the court properly held that "until separation or designation of the particular property, no action of replevin could be maintained."

The defendant has failed utterly to show fraud or want of consideration. The evidence establishes, beyond controversy, that the note and mortgage were given for a full and valuable consideration. Upon the proofs it is clear that the defendant disposed of his property, the cotton particularly, to hinder and delay the plaintiffs in the collection of their debt. The defendant does not feel that he was guilty of any moral fraud. He justifies his act to his own conscience upon grounds which the court finds either had no existence in fact, or constitute no legal justification. Whatever his

motive may have been, it is clear he intended, by the disposition he made of his property, to hinder and delay his creditors in the collection of their debt. This finding supports the attachment.

The defendant has been summoned and examined under section 415 of Gantt's Digest. That section reads as follows:

Sec. 415. "When it appears by the affidavit of the plaintiff, or by the return of an officer to an order of attachment, that no property is known to the plaintiff or the officer on which the order of attachment can be executed, or not enough to satisfy the plaintiff's claim, the defendant may be required by the court to attend before it, and give information on oath respecting his property; and where it also appears by the affidavit of the plaintiff that some person other than the defendant has in his possession property of the defendant, or evidences of debt, such person may also be required by the court to attend before it, and give information on oath respecting the same."

He admits that he has in his possession and control the proceeds of the sale of the thirty bales of cotton, amounting to \$800. The plaintiffs have filed a motion for a rule on the defendant to pay this money to the marshal or into the registry of the court. This motion is resisted on the ground that the court has no power or jurisdiction to make such an order.

It is vain for the statute to provide that the defendant may be required to attend before the court, "and give information on oath respecting his property," if after giving such information the court is powerless to act upon it, and require the defendant to do what is plainly and obviously his legal duty. The authority to compel the discovery necessarily implies the power to render the discovery effectual. It is a settled canon of construction that what is implied in a statute is as much a part of it as what is expressed.

Suppose a defendant to answer that he has ten horses concealed within the jurisdiction of the court, and refuses to

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give information which will enable an officer to find them. May he not be committed until he does do so? Unless the court has this power, the statute is nugatory. Money is property, and in proceedings under this section there is no distinction between it and other kinds of property. The popular notion that a debtor can put his money in his pocket and *admit* that *it is there*, and continue to defy his creditors, is not the law in this state. In cases of attachment he can be reached by proceedings under section 415, and after judgment he can be reached by proceedings had under sections 2713-2717. Where the discovery is made after judgment, section 2717 provides that:

“The court shall enforce the surrender of the money or security therefor, or of any other property of the defendant in the execution which may be discovered in the action, and for this purpose may commit to jail any defendant or garnishee failing or refusing to make such surrender, until it shall be done, or the court is satisfied that it is out of his power to do so.”

The court possesses the like powers when the discovery is made by an examination had under section 415. The proceedings in both instances are analogous to the recognized practice in chancery cases and in bankruptcy.

The sacredness of the defendant's person is not violated, nor is he imprisoned for debt. He is simply required to do that which, upon his own admission under oath, it is his legal duty to do, and which he admits it is in his power to do. When committed for refusing to obey such an order, it is in no sense a commitment for debt. It is a commitment as a punishment for contempt in refusing to obey a valid order of the court. The jurisdiction to commit for such cause is inherent in every court, whether of law or equity. To say that a defendant in an attachment, who admits on his examination on oath that he has in his possession and control money or other property liable to seizure to satisfy the writ, cannot be required to place such means within the grasp of

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the law, or that obedience to such an order may not be enforced by the usual methods by which courts enforce obedience to their lawful commands, is to grant an immunity to dishonest debtors, as shocking to our sense of justice as was the imprisonment of honest men for not paying debts which they had no means to pay.

Imprisonment for debt is abolished, but the laws authorizing the seizure of the debtor's property and its application to the payment of his debts remain, as do the old as well as the new remedies given to creditors to discover property for this purpose. The examination of the defendant in attachment is to effectuate this object, and for no other purpose. But the constitution of this state does not exempt from imprisonment for debt "in cases of fraud." Article 2, § 16, Const. It would be difficult to imagine a clearer case of fraud than for a debtor to admit under oath that he had money and property to pay his debts, and at the same time refuse to surrender it for that purpose.

Suitors in this court are entitled to have enforced in their favor all the remedies supplementary to and in aid of writs of attachment and execution authorized by the state law, and the proceedings for that purpose may be at law or in equity, according as the state statute provides.

The case of *Ex parte Boyd*, 105 U. S. 647, arose under an analogous statute in the state of New York. In that case Boyd, against whom an execution had been issued, was ordered to submit to an examination before a commissioner of the court concerning his property. He refused to take an oath to testify under said order, whereupon he was attached and committed for contempt by the circuit court. He thereupon filed in the supreme court of the United States a petition for a writ of *habeas corpus*, which, upon a very full consideration of the case, was denied.

The following extract from the opinion shows that the examination of a debtor with the view to the discovery of

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assets is not a novel or unusual, nor necessarily an equitable, proceeding:

"There is certainly nothing in the nature of an examination of a judgment debtor, upon the question as to his title to and possession of property applicable to the payment of a judgment against him, and of the fact and particulars of any disposition he may have made of it, which would render it inappropriate as a proceeding at law, under the orders of the court, where the record of the judgment remains, and from which the execution issues. Such examinations are familiar features of every system of insolvent and bankrupt laws, the administration of which belongs to special tribunals, and forms no necessary part of the jurisdiction in equity. It is a mere matter of procedure, not involving the substance of any equitable right, and may be located by legislative authority to meet the requirements of judicial convenience. Whatever logical or historical distinctions separate the jurisdictions of equity and law, and with whatever effect these distinctions may be supposed to be recognized in the constitution, we are not of opinion that the proceeding in question partakes so exclusively of the nature of either that it may not be authorized, indifferently, as an instrument of justice in the hands of courts of whatever description."

An order will be entered requiring the defendant to pay into the registry of the court, within ten days after service of the order, the \$800 cash which he admits he has in his possession and control, to abide the further order of the court in the premises.

Smoots & McRae and *U. M. & G. B. Rose*, for plaintiffs.

W. G. Whipple, for defendant.

United States v. Waddell and others.

UNITED STATES v. WADDELL and others.

(Eastern District of Arkansas. April, 1883.)

1. **SETTLERS ON PUBLIC LANDS—CONSPIRACY TO INTIMIDATE—CRIME UNDER SECTION 5503, R. S.**—During the period that a settler on public lands is required by the laws of the United States to reside upon the land in order to perfect his title thereto, he is in the enjoyment of a right guarantied to him by those laws, and a conspiracy to deprive him of that right is a conspiracy to deprive him of a right guarantied by the constitution and laws of the United States, and a crime under section 5508 of the Revised Statutes.

On demurrer to the information.

Before McCrARY and CALDWELL, JJ.

McCrARY, *Circuit Judge*.—This is a criminal information, filed by the United States attorney, charging an offense under section 5508 of the Revised Statutes of the United States. The information contains three counts. The first count charges:

“That Burrell Lindsay, a citizen of the United States of America, on the thirtieth day of December, 1882, at the United States land office in Little Rock, Arkansas, made homestead entry of the following described tract of land, belonging to the United States, in the county of Van Buren, and eastern district of Arkansas, to wit, the S. W. fractional $\frac{1}{4}$ of section 26 S., township 9 N., range 13 W., and that thereafter, on the tenth day of January, 1883, the said Burrell Lindsay, citizen of the United States as aforesaid, was residing upon and cultivating said tract of land as aforesaid, for the purpose of protecting his right to the same, under the laws of the United States, as a homesteader, in good faith, his right to a patent from the United States to such land not yet having accrued, and that David Waddell, Samuel McDaniel, James Holland, R. M. Evans, Joel Hubbard, and Benjamin F. Palmer, being persons of evil minds

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and dispositions, together with divers evil-disposed persons, whose names are to the said United States attorney unknown, on the said tenth day of January, 1883, at the eastern district of Arkansas, did conspire to injure, oppress, threaten and intimidate the said Burrell Lindsay, citizen of the United States as aforesaid, in the free exercise and enjoyment of certain rights and privileges secured to him by the constitution and laws of the United States, and because of his having exercised the same, to wit, the right and privilege to make said homestead entry on lands of the United States as aforesaid, and the right and privilege to reside upon, cultivate and improve said homestead entry, and the right to mature title to himself to said homestead entry; said rights and privileges being duly conferred upon him, the said Burrell Lindsay, citizen of the United States as aforesaid, by the constitution and laws of the United States, and in particular by sections 2289, 2290, 2291, Revised Statutes of the United States, and other laws of congress as to homestead entries, and by his individual acts in compliance therewith and in pursuance thereof, contrary to the form of the statute," etc.

The second count makes the same opening averments as to homestead entry and conspiracy, and concludes by charging an overt act in pursuance of the conspiracy.

The third is framed under the latter clause of section 5508, Revised Statutes. It makes the same opening averment as the first count in reference to homestead entry and occupancy, and concludes by charging that defendants went in disguise upon the premises of the homesteader with intent to deprive him of his right to occupy same and perfect his title.

It is insisted that the information fails to charge any offense against the United States, and also that section 5508 of the Revised Statutes is unconstitutional. We all know that the homestead law of the United States requires the settler to reside for a given period upon the tract of public land selected as a homestead before he can perfect his title

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and obtain his patent. His continued residence upon the land during this period is therefore a requirement of the law, and to deprive him of the right to remain upon the land for the purpose of perfecting his title would seem to me to be to deprive him of a right guarantied to him by the homestead act. Section 5508 of the Revised Statutes of the United States provides for the punishment of two or more persons who shall "conspire to injure, oppress, threaten or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the constitution or laws of the United States, or because of having exercised the same." Is this statute violated by a conspiracy to drive a homesteader off the land taken up by him as a homestead and while he is occupying it for the purpose of completing his title? During that time his title is inchoate, and if he leaves the land he forfeits his right. If the alleged outrage had been committed after his title was complete, we should all agree that the crime was one arising under the laws of the state alone.

But the question here is whether, during the period that the settler is required by the laws of the United States to reside upon the land in order to perfect his title, he is in the enjoyment of a right guarantied to him by those laws so that a conspiracy to deprive him of that right is a crime under the act of congress; in other words, whether it is a conspiracy to deprive him of a right guarantied to him by the constitution and laws of the United States. Upon this question we are not entirely agreed. The court is always reluctant in a criminal case to decide finally a question of law which goes to the merits of the case, because, without a certificate of division, there is no writ of error, and the judgment of the court in respect to such a case is final. My own inclination is to hold that the offense here specified is a crime under the laws of the United States, but in view of the doubts in my mind I should be very reluctant to do so, unless upon certificate of division, which will enable the de-

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fendants to take the case to the supreme court. My brother, Judge Caldwell, is inclined to the other view. We can, therefore, certify the question for the final determination of the supreme court, and that is what we have decided to do. It is an interesting question, and one of grave doubt and general importance, because homestead laws are not of such a transient character that they are likely to pass away speedily; they are permanent laws, and will remain for a long period in this country.

The result is that the questions arising on the demurrer to the information will be certified.

C. C. Waters, United States attorney, for plaintiff.

J. W. Martin, for defendants.

SIMPLIT v. CHICAGO, M. & ST. P. R'Y CO.

(Northern District of Iowa. 1883.)

1. RAILROAD — USE OF STREET FOR TRACKS — GRANT TO CITY OF DUBUQUE — ACTS OF CONGRESS OF JULY 2, 1836, AND MARCH 3, 1837 — STATUTE OF LIMITATIONS — ESTOPPEL — JUDGMENT AGAINST CITY. — When the town of Dubuque was laid out by the acts of congress of July 2, 1836, and March 3, 1837, the United States caused a reservation to be made of a strip of land fronting on the Mississippi, the same being reserved for and dedicated to public use forever "for the purposes of a highway and for other public uses." In 1853 the United States granted this land to the city of Dubuque, providing, however, that this grant should "in no manner affect the rights of third persons therein or to the use thereof, but should be subject to the same." This strip, then known as Front street, was used as a highway and for levee purposes, and subsequently portions of it were occupied by the tracks of railroad companies, and in 1874 the track now owned by the Chicago, Milwaukee & St. Paul Railway Company was laid over a triangle forming part of Front street as originally laid out. At that time there was no building or fence or other erection on the land on which the track was laid. The plaintiffs had been in pos-

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session of this triangular track for over ten years, and during that time they had paid to the city certain sums assessed for the laying out, curbing and paving of streets adjacent thereto, but they had full knowledge of the fact that this triangle was part of the public reservation. They claimed title to the land under three claims: (1) adverse possession under the statute of limitations; (2) an equitable estoppel against the public; and (3) an adjudication by the district court of Dubuque county in their favor in *Simplot v. City of Dubuque*; and, as owners of the land, demanded damages from the railroad under the provisions of section 1244 of the code of Iowa. *Held*,

(1) That, as the city of Dubuque was incorporated under a special charter, the provisions of section 464 of the code were not applicable, and the owner of land abutting on a highway or street along which a railroad track was laid could not recover damages unless he owned the fee in the soil over which the tracks passed; and as the title to this land was held by the city as a trustee for the furtherance of the public uses and purposes to which the property had been originally dedicated, title could not be acquired by adverse possession, and plaintiffs were not entitled to recover.

(2) That the act of the city in collecting the taxes was for its own benefit alone, and could not work an estoppel as against the general public, for whose use the triangle was dedicated, and plaintiffs could derive no title by reason of an estoppel.

(3) That as the railroad company did not acquire its sole right to use the street for its tracks from the city, but by virtue of the original act of congress, in dedicating this track to public uses, it was not bound by the decree and judgment against the city in the case of *Simplot v. City of Dubuque*, to which it was not a party.

2. MUNICIPAL CORPORATIONS — STATUTE OF LIMITATIONS — ESTOPPEL IN PAIS. — When a municipal corporation seeks to enforce its private rights, as distinguished from rights belonging to the public, it may be defeated by force of the statute of limitations; but in all cases wherein the corporation represents the public at large or the state, or is seeking to enforce a right pertaining to sovereignty, the statute of limitations, as such, cannot be made applicable. In such cases, however, the courts may apply the doctrine of estoppel *in pais*, and by means thereof, when justice and right demand it, prevent wrong and injury being done to private rights.

This proceeding was instituted by the plaintiffs, under the provisions of section 1244 of the code of Iowa, for the assessment of the damages claimed by plaintiffs to have been

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caused to their property by the construction and operation of the railroad track now occupied by the defendant corporation at and near the intersection of Iowa and First streets, in the city of Dubuque, Iowa.

The plaintiffs are, and have been for years, the owners of certain realty abutting on Iowa and First streets, and they claim that the track in use by the defendant is located upon their property to their damage; and, for the purpose of settling the amount of damages, the plaintiffs, under the provisions of section 1244 of the code, made application to the sheriff of the proper county for the appointment of commissioners as therein provided.

Upon the coming in of the report of the commissioners, both parties appealed to the circuit court of Dubuque county, and under the provisions of section 1254 the land-owners appeared in that court as plaintiffs, and the railway corporation as defendant, and thereupon the latter removed the cause to this court.

The cause coming up for trial before the court and jury, the defendant admitted in open court that the said Chicago, Milwaukee & St. Paul Railway Company, defendant herein, was the successor by purchase of the rights of the Dubuque, Bellevue & Mississippi Railroad Company; of the Chicago, Clinton & Dubuque Railroad Company; and of the Chicago, Clinton, Dubuque & Minnesota Railroad Company; that the track now used and owned by the defendant was first used for railroad purposes in 1874, and had since then been used by the companies to whose rights this defendant had succeeded; that plaintiffs were the owners in fee-simple of lots 529 and 530, as platted on the original map of the town of Dubuque, as laid out by the commissioners appointed under the provisions of the act of congress of 1836. Thereupon the plaintiffs in open court admitted that the track operated by the defendant, and the railroad companies under which it claimed, was not located upon any part of lots 529 and 530 as originally laid out; that it passed over a triangu-

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lar piece of ground adjacent to said lots, which triangular piece of ground formed part of Front street, as shown on the original map of Dubuque; that Front street, as shown on that map, constituted the reservation which the commissioners had reserved for public uses, as provided for in said act of congress; that plaintiffs knew that said triangle was part of said reservation, and did not claim title thereto as being part of either lots 529 and 530; that they had no patent or conveyance of said triangle, but claimed title thereto under the statute of limitations, and under the decree rendered in the case of *Alexander and Charles Simplot v. The City of Dubuque*, in the district court of Dubuque county, Iowa.

A map or plat of the ground, showing its present condition and surroundings, was admitted in evidence, as well as a copy of so much of the original map of the town of Dubuque as shows the reservation of Front street, set apart for public uses, with lots 529 and 530, and surroundings.

Plaintiffs introduced in evidence the decree rendered in their favor against the city of Dubuque, in a cause instituted by them in 1874, in the district court of Dubuque county, Iowa; and also introduced in evidence a written agreement signed by Amos H. Peaslee, then mayor of the city of Dubuque, William G. Stewart, and the plaintiffs, which provided for the laying down and taking up of the track across the triangle in question; and also introduced evidence showing that the track laid down under this agreement had not been taken up, although they had demanded that it should be removed, both of the city and William G. Stewart, as the representative of the Dubuque Harbor Company; that after Stewart was through with the use of the track, the Chicago, Clinton & Dubuque Railroad Company commenced the use of the track, placing a car on the same in the night-time, without the knowledge or consent of plaintiffs; that the Chicago, Clinton & Dubuque Railroad Company

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and its successor have ever since used the track and refuse to remove it.

The court directed the jury to find a special verdict in answer to certain questions submitted to them by the court, and these findings are to be read as part of this statement of facts.

Both parties moved for judgment upon the special findings or verdict of the jury. Upon consideration thereof, the court found and adjudged that the proceedings should be dismissed at cost of plaintiffs, for the reasons that plaintiffs had failed to show that they were the owners of the triangle over which the defendant's track is located, and that hence they could not recover damages in this proceeding, the grounds for which conclusion are more fully set forth in the following opinion.

M. H. Beach, for plaintiffs.

W. J. Knight and *D. S. Wegg*, for defendant.

SHIRAS, District Judge.—By the act approved July 2, 1836, congress provided for the "laying off the towns of Fort Madison and Burlington, in the county of Des Moines, and the towns of Bellevue, Dubuque and Peru, in the county of Dubuque, territory of Wisconsin."

The act provided that the towns named should, under the direction of the surveyor general, be laid off into town lots, streets, avenues, and lots for public use called the public squares, and that, upon the completion of the survey of the lots, a plat thereof should be returned to the secretary of the treasury, and the lots should be offered for sale at public sale; it being further enacted "that a quantity of land of proper width, on the river banks, at the towns of Fort Madison, Bellevue, Burlington, Dubuque and Peru, and running with said river the whole length of said towns, shall be reserved from sale (as shall also the public squares) for public use, and remain forever for public use, as public highways, and for other public uses."

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Under the provisions of this act of congress, and the act amendatory thereof, passed March 3, 1837, the town of Dubuque was laid out, and a plat thereof was executed and filed at Washington as required by the act.

The reservation provided for on the river bank was properly laid off and platted, and on the map was clearly indicated by well defined lines.

In 1853 congress passed "An act for the relief of the town of Bellevue, and the cities of Burlington and Dubuque," whereby there was granted to the cities of Burlington and Dubuque the land bordering on the Mississippi river, and reserved for public uses under the act of 1836, to be disposed of as the corporate authorities of said cities should direct; it being further provided "that the grant made by this act shall operate as a relinquishment only of the right of the United States in and to said premises, and shall in no manner affect the rights of third persons therein, or to the use thereof, but shall be subject to the same."

In the case of *Cook v. City of Burlington*, 30 Iowa, 94, the supreme court of Iowa construed this act of congress of 1853, and its effect upon the reservation provided for in the act of 1836, and reached the following conclusions:

(1) That, under the act of 1836, the strip reserved was dedicated to public use, and that, after the sale of lots abutting thereon to individuals, the act making this dedication assumed the character of a contract which could not afterwards be abrogated and repealed; that, after the passage of the act of 1836, and the sale of lots thereunder, the public acquired a right in this reserved strip for a highway and other public uses; and to the extent of the right acquired by the public, that of the government was limited and controlled. The use was dedicated to the public, and the act of congress making the dedication was in the nature of a contract which could not afterwards be repealed; that the title remained in the government, but was held in trust.

(2) That the act of 1853 had the effect of subrogating the

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city to the rights of the United States government in the property; that the power of absolute disposition did not reside in the government, and did not pass to the city; that the city took it for the same purposes for which the government held it, subject to the same trusts and affected by the same conditions; that it could dispose of it for public uses, but not for private uses; that having only a qualified title, the city cannot convey an absolute one.

(3) That the reservation was set aside "for public highway and for other public uses;" that the use thereof for the construction of a railroad along the same came within the purposes of the dedication by the act of congress, it being covered by the phrase "other public uses," even if it did not come within the use "for a public highway."

In the case of *Milburn v. City of Cedar Rapids*, 12 Iowa, 247; *Clinton v. C. R. & M. R. R. Co.* 24 Iowa, 455; *C. N. & S. W. R. Co. v. Mayor of Newton*, 36 Iowa, 299, and other causes following the rulings therein announced, it was held by the supreme court of Iowa that a railroad might be located along a public street or highway without the consent of the city or town, and without compensation being made therefor, subject, however, to proper equitable control.

This rule remained the law of the state until the adoption of the code of 1873, by section 464 of which it was enacted that cities shall have the power to authorize or forbid the location or laying down of tracks for railways, etc., along the streets and alleys, etc., and further providing for the payment of damages. This section, however, forms part of chapter 10, tit. 4, of the code, known as "The General Incorporation Act," and does not apply to or in any manner affect the rights or powers of cities acting under special charters, of which Dubuque is now, and always has been, one.

In *Slatten v. Des Moines Valley R. R.* 29 Iowa, 148, it was ruled that the owners of property abutting on a street, the fee of which was in the city, could not recover damages for

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the injury to their property caused by the construction of a railroad along the street in front of their property.

This decision was upheld in *City of Davenport v. Stevenson*, 34 Iowa, 225; *Barr v. Oskaloosa*, 45 Iowa, 275; and other cases not necessary to cite.

In *Kucheman v. C., C. & D. R'y Co.* 46 Iowa, 366, the question of the right of the owner to recover damages for the construction of a railway along a street, where the abutting owner owned the fee in the street, subject to the easement of the highway, was presented, and it was determined that, if he owned the fee in the street, then he might recover damages, upon the theory that the construction of the railroad imposed an additional burden upon the soil, the title of which is in the abutting owner; that thereby his property is taken for public use, and he is entitled to damages.

In 1874, therefore, when the railway track complained of in this cause was operated for railroad purposes, the rules of law applicable thereto were as follows:

The city of Dubuque was incorporated under a special charter, and the provisions of section 464 of the code of 1873 did not apply to Dubuque; therefore, if a railroad track was laid along a street or highway, the abutting owner could not recover damages unless he owned the fee in the soil over which the track was laid; that if he owned property abutting on a highway, but did not own the soil or fee in the highway, then any damages he might suffer by the construction of a railroad along the highway were purely consequential and not recoverable.

The pivotal point, therefore, in the cause, is the question whether the plaintiffs were, in 1874, when the track now operated by defendant was first put in use, the owners of the soil or fee in the strip over which the track was laid and upon which it now remains.

The plaintiffs owned lots 529 and 530 as laid off on the original map of the town of Dubuque, but it was admitted in open court by plaintiffs that the triangle over which the

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railroad track was laid did not form part of lots 529 and 530; that it was part of Front street,—that is to say, of the reservation dedicated to public use under the act of congress of 1836; that the plaintiffs never had had any patent or conveyance thereof from any source. The plaintiffs claimed, however, that they had had the open, adverse and hostile possession of the triangle for more than ten years before the track was laid down thereon, and that under the principles of the statute of limitations, and the doctrine of equitable estoppel, they were the owners of the triangle, and that their right had been recognized and adjudicated by the supreme court of Iowa, in a proceeding brought by them against the city of Dubuque.

As already shown, the land composing Front street was reserved from sale when the town of Dubuque was laid out, and the title thereto remained in the United States until 1853, when it was transferred to the city of Dubuque, under the conditions and limitations set forth in *Cook v. City of Burlington, supra*. The city never conveyed or granted the title to plaintiffs. Hence plaintiffs must establish their title without the aid of a grant or conveyance, actual or supposed, of the record or fee title.

In the case of *Ingram v. C. D. & M. R. Co.* 38 Iowa, 676, a case brought to recover damages for the construction of a railroad along this same Front street in Dubuque, it was ruled that plaintiffs therein, who were owners of abutting property, could not recover; that the company had the right, *without the consent of the city*, to construct its track along Front street.

Plaintiffs claim title to the triangle in question under three claims: (1) Adverse possession under the statute of limitations; (2) an equitable estoppel against the public; (3) an adjudication in their favor in the case of *Simplot v. City of Dubuque*, which they rely upon as binding upon the defendant and the public at large.

In the special verdict returned by the jury they found

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that the plaintiffs had been in the open, adverse and continuous possession of the triangle for more than ten years previous to the location and operation of the railroad track across the same in 1874.

The legal proposition to be determined, therefore, is whether plaintiffs can avail themselves of the statute of limitations to establish a title to this triangle, as against the public and the defendant. The defendant claims the right to operate its railroad track across the triangle, because the same forms part of the reservation set apart under the act of congress for public uses. By the act of congress this reservation was forever dedicated to public use. It was reserved from sale when the other lots in the town of Dubuque were sold to private parties, and by express dedication it was set apart for the purpose of a public highway, and for other public uses. Thus the United States government exercised its undoubted power to dispose of this property as in its judgment was wisest and best for the interests of the public.

When congress in 1853 transferred the title to this strip of land to the city of Dubuque, it simply substituted the city as a trustee, to hold the title, subject to all the conditions and liabilities to which the property was subject when the title stood in the United States. This is expressly held by the supreme court of Iowa in *Cook v. City of Burlington*, *supra*.

Could the legislature of Iowa, or the people thereof, in their sovereign capacity, in any manner authorize or empower the city of Dubuque, or any citizen thereof, to divert said reservation to a private use, or to a use inconsistent with and destructive of the purposes contemplated in the original dedication of it to public use, as declared in the act of 1836?

In the act of congress approved March 3, 1845, providing for the admission of Iowa into the Union, as a condition thereto it was required that the state should agree, by ordinance, that it would never "interfere with the primary disposal of the soil within the same by the United States,

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nor with any regulations congress may find necessary for securing the title in such soil to the *bona fide* purchasers thereof."

By an act and ordinance of the general assembly of Iowa, under date of January 15, 1849, this proviso was accepted, and was made irrevocable and unalterable.

In the case of *King v. Ware*, 53 Iowa, 97-100 (*S. C.* 4 N. W. Rep. 858), the supreme court of Iowa held that under the terms of this ordinance "it was not within the power of the state to question his title by escheating the lands, or nullifying the sale made by the United States in any other manner."

If, then, this reservation was dedicated to public use forever, by the act of 1836, when the title thereof was in the United States, and if the act of 1853, as is held by the supreme court of Iowa in *Cook v. City of Burlington*, did not change or abrogate this dedication, but operated only to change the holding of the title from the United States to the city of Dubuque, then the property remained for public use by the express provisions of the act of congress, and this constitutes a primary disposal of the property by the United States, which it is beyond the power of the state of Iowa to abrogate or nullify in any manner. In other words, if the legislature of Iowa should enact that this reservation should no longer be used for public purposes and uses, but should be sold by the city for private use, such an act of the legislature would be wholly void under the ordinance above referred to.

If, then, it be true that the state of Iowa cannot lawfully defeat or nullify the primary disposal of the lands within its borders by the United States, can it be done indirectly through the operation of its statutes of limitations, in cases like the one now before the court? If the United States grant land to A. in fee, and B. occupies same adversely for the requisite time, he will obtain a title against A., but this does not affect or defeat the title conveyed by the United States to A. The right and title acquired by possession take

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the place of an actual conveyance from A. to B., and as A. has the absolute right to convey the lands to B., the latter can acquire them by adverse possession. If, however, the United States reserves lands in Iowa for a public use, and dedicates them to such use, so that the trust has attached to the naked title in the hands of the government, and then the government conveys the same to A. to be held by him for the public and for the public uses only, he having the right to convey the same for such uses, could B. in such case, by invoking the statute of limitations of the state, obtain the title and ownership of such land, when it is expressly provided in the organic law of the state that it shall not interfere with the disposition of the soil thereof, made by the United States?

That the United States did primarily dedicate and set apart their land to the public use forever is admitted.

If B. can, by invoking the statute of limitations of the state, be declared the owner of the land as his private property, then it is clear that thereby the disposition of the land by the United States has been defeated.

The legal mode by which this has been accomplished, if it has been done, is through the operation of a statute of the state. Can such a result be permitted without violating the terms of the compact between the state and the United States, by which the former bound itself never to interfere with the disposal by the United States of the land within the boundaries of the state.

Suppose, after Iowa had become a state, the general assembly had passed an act providing that any and all persons who should cultivate any portions of these reservations, and pay taxes thereon for a period of five or ten years, should be deemed the owners in fee thereof, could it be possible that such an act could be upheld, in the face of the express compact entered into with the United States? If not, where-in would such an act, in effect, differ from the claim that is now made under the general statute of limitations?

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In the case of *King v. Ware*, already cited, the supreme court of Iowa held that where the United States had granted lands to a non-resident alien, at a time when, under the laws of Iowa, such aliens could not hold lands in Iowa, but the same were liable to be escheated, that this statute could not be invoked to defeat the title conveyed by the United States. The right of disposition was with the United States, and could not be defeated by the effect of any statute of the state. This case is in point, and in effect holds that the state cannot, by the effect of its general statutes, defeat the primary disposition made by the United States of any lands in Iowa. Applying this principle to the case at bar, it would follow that plaintiff cannot, by invoking the aid of the statute of limitations of the state, defeat the operation of the act of 1836, whereby Front street was forever reserved from sale to private parties and dedicated to public use.

A further question is presented by this branch of this case, to wit, whether the plaintiffs can rely on adverse possession as giving them a good title against the public.

The plaintiffs claim that the interests and rights of the public are wholly vested in and represented by the city of Dubuque, and while they admit that so long as the title remained in the United States they could not get the benefit of the statute of limitations, yet that, when the title was relinquished by the United States to the city in 1853, then the statute would run in their favor. It must be kept in mind that this strip or reservation was not conveyed to the city as its private property. The public retained its full rights therein, and the city held the title as a trustee for the furtherance of the public uses and purposes to which the property had been originally dedicated. Under such circumstances can the right of the public to the use of the reservation be defeated by showing an adverse possession within the meaning of the statute of limitations?

In Dill. Mun. Corp. (3d ed.) § 675, the following is stated to be the correct view of the question:

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“Municipal corporations, as we have seen, have, in some respects, a double character — one public, the other (by way of distinction) private. As respects property not held for public use, or upon public trusts, and as respects contracts and rights of a private nature, there is no reason why these corporations should not fall within limitation statutes, and be affected by them. For example, in an action on contract or for tort, a municipal corporation may plead, or have pleaded against it, the statute of limitations. But such a corporation does not own and cannot alien public streets or places, and no laches on its part or on that of its officers can defeat the right of the public thereto; yet there may grow up, in consequence, private rights of more persuasive force in the particular case than those of the public. It will, perhaps, be found that cases will arise of such a character that justice requires that an equitable estoppel shall be asserted, even against the public; but if so, such cases will form a law unto themselves, and do not fall within the legal operation of limitation enactments. The author cannot assent to the doctrine that, as respects public rights, municipal corporations are within ordinary limitation statutes. But there is no danger in recognizing the principle of an *estoppel in pais*, as applicable to such cases, as this leaves the courts to decide the question, not by the mere lapse of time, but by all the circumstances of the case to hold the public estopped or not, as right or justice may require.”

In the case of *Burlington v. B. & M. R. R. Co.* 41 Iowa, 141, the supreme court of Iowa recognized the true rule to be that when the city laid aside its sovereignty and placed itself in the position of a contracting party and dealt with the individual, not as a subject, but as a natural person, it then subjected itself to the provisions of the statute of limitations.

In *Pella v. Scholte*, 24 Iowa, 298, it was held that the statute could be successfully pleaded against the city, when it sought to enforce *its* rights to a square alleged to have been

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dedicated to the use of the citizens; but it was also announced that this ruling "would not necessarily apply to a case where the dedication was general, unlimited, and for the whole public, and not restricted, or for the primary benefit of the contemplated municipality, and hence under its special control and guardianship; or to a case where the public corporation was ignorant of its rights or those of the public, or that these had been encroached upon, or that a hostile right was being asserted against it; or to a case where the action was by the state or its public officer to assert the public rights, and not the municipal corporation to assert its rights."

In *Davies v. Huebner*, 45 Iowa, 574, the court quotes the foregoing extracts from *Pella v. Scholte* approvingly, and further says:

"It will be readily seen that a distinction is here made between the rights of a municipal corporation and those of the state or the general public. We believe the weight of authority is that the statute does not run against the general public because of the adverse possession of a highway established in the manner prescribed by law. Whether this rule should prevail in this state we do not determine; and yet we believe there are cases where the non-user has continued for such a length of time, and private rights of such a character have been acquired by long-continued adverse possession, and the consequent transfer of lands by purchase and sale, that justice demands the public should be estopped from asserting the right to open the highway."

These decisions by the supreme court of Iowa, it seems to me, are in accord with the principles laid down in *Dillon on Municipal Corporations*, and that the true rule is that when a municipal corporation seeks to enforce a contract right, or some right belonging to it in a proprietary sense, or, in other words, when the corporation is seeking to enforce the private rights belonging to it, as distinguished from rights belonging to the public, then it may be defeated by force of the

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statute of limitations; but in all cases wherein the corporation represents the public at large or the state, or is seeking to enforce a right pertaining to sovereignty, then the statute of limitations, as such, cannot be made applicable.

In the latter cases, the courts may apply the doctrine or principle of an estoppel, and by means thereof, where justice and right demand it, prevent wrong and injury from being done to private rights.

In the case at bar, the plaintiffs are seeking, by the aid of the statute of limitations, to defeat the right of the defendant corporation to use the reservation known as Front street for one of the public uses to which it was dedicated by the act of congress. Even if the city of Dubuque was a party to this litigation, and the statute was technically pleaded against the city, I do not think it could be held good, for the reason that the city would then be representing a public right, of the nature of sovereignty, and in that case, in my judgment, the statute cannot be successfully pleaded. The city, however, is not a party to the record. The defendant is operating its line of road over a part of Front street, in strict accordance with the uses and purposes for which the reservation was dedicated to the public.

The plaintiffs seek to show that they have become the owners of a part of Front street, and have defeated the right of the public thereto, by reason of the statute of limitations.

To such a case, arising under the circumstances shown herein, in my judgment the statute is inapplicable, and plaintiffs cannot make out their title to the triangle in dispute by force of the statute.

2. The next question for decision is whether, under the facts of the case, plaintiffs are entitled to estop the defendant corporation from questioning their title to the portions of the triangle occupied by the railroad company. In most of the cases wherein this doctrine of estoppel has been recognized, it has been applied to protect a defendant from

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being disturbed in the possession of rights which have been acquired by long-continued adverse possession. It has been used as a shield for protection, not as weapon of attack. In the case at bar, the defendant corporation has been occupying and using the railroad track over the triangle ever since it purchased the right of the Chicago, Clinton, Dubuque & Minnesota Railroad Company, in 1881. And that company and its predecessors had been using the track since 1874.

The object of this proceeding is to compel the defendant to pay damages to plaintiffs for using this track, on the ground that the track is located upon the property of plaintiffs, and therefore plaintiffs are entitled to damages. When the defendant denies the ownership of plaintiffs, and challenges the plaintiffs to produce the evidence of such ownership, the reply is that the defendant and the public are estopped from questioning plaintiffs' title.

What are the facts relied on as the basis of an estoppel? They are: (1) Adverse possession for ten years or more; (2) payment by plaintiffs to the city of Dubuque of certain assessments levied for the curbing and paving the streets of the city adjoining the triangle and lots 529 and 530; (3) the judgment obtained by plaintiffs in the case against the city of Dubuque.

The jury found that plaintiffs had been in adverse possession of the triangle for more than ten years; that when the railroad track was laid down and operated, there were no buildings, fences or erections thereon which had to be removed to make way for the track; that plaintiffs had never put that portion of the triangle on which the track was placed to any use inconsistent with its use for railroad purposes.

It was admitted in open court, on behalf of the plaintiffs, that they knew that lots 529 and 530, as laid out, did not embrace the triangle. The map of Dubuque clearly and unmistakably shows that the triangle formed part of Front street; that is to say, of the reservation set apart for public

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use. The jury expressly found that plaintiffs, from and after 1865, knew that the triangle was a part of Front street, and the evidence no less clearly shows that plaintiffs and their father, from whom plaintiffs inherited the property, had such knowledge from the time of the original purchase of lots 529 and 530.

In the case of *Brant v. Virginia Coal Co.* 93 U. S. 335, the general rules governing the doctrine of equitable estoppel are fully stated as follows: "For the application of that doctrine there must generally be some intended deception in the conduct or declarations of the party to be estopped, or such gross negligence on his part as to amount to constructive fraud, by which another has been misled to his injury." "In all this class of cases," says Story, "the doctrine proceeds upon the ground of constructive fraud or of gross negligence, which, in effect, implies fraud; and therefore, when the circumstances of the case repel any such inference, although there may be some degree of negligence, yet courts of equity will not grant relief. It has been accordingly laid down by a very learned judge that the cases on this subject go to this result only: that there must be positive fraud or concealment, or negligence so gross as to amount to constructive fraud." 1 Story Eq. 391. To the same purport is the language of the adjudged cases. Thus it is said by the supreme court of Pennsylvania that "the primary ground of the doctrine is that it would be a fraud in a party to assert what his previous conduct had denied, when on the faith of that denial others had acted. The element of fraud is essential, either in the intention of the party estopped, or in the effect of the evidence which he attempts to set up. . . . And it would seem that to the enforcement of an estoppel of this character, with respect to the title of property, such as will prevent a party from asserting his legal rights, and the effect of which will be to transfer the enjoyment of the property to another, the intention to deceive and mislead, or negligence so gross as to be culpable, should be clearly es-

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tablished. . . . It is also essential for its application, with respect to the title of the real property, that the party claiming to have been influenced by the conduct or declarations of another, to his injury, was himself not only destitute of knowledge of the true state of the title, but also of any convenient and available means of acquiring such knowledge. Where the condition of the title is known to both parties, or both have the same means of ascertaining the truth, there can be no estoppel."

In the case at bar the plaintiffs have always known that this triangle formed part of Front street. They have always known that it did not form part of lots 529 and 530, owned by them. They have always known that they had no record title thereto. They have always known that the triangle formed part of a strip of land reserved from sale to private parties, and formally, expressly and fully dedicated to the public for public uses and trusts forever. With this knowledge on their part, how can it be said that they have been misled to their injury? Who has misled them or deceived them? No one. In their own wrong they entered into possession of the triangle. When the city of Dubuque called on them for payment of assessments for curbing and paving the city streets around the triangle, they paid these sums knowingly, and without any fraud being practiced upon them by the public. They have not erected any buildings or permanent improvements upon the premises, and, as is expressly found by the jury, they have not put the portion of the triangle occupied by the railroad to any use inconsistent with its use for railroad purposes.

There are many cases to be found in the books wherein it has been held that where parties have erected valuable buildings or other permanent improvements, which have encroached upon public highways, and the same have remained undisturbed for the requisite time, then the public will be estopped. In these cases, however, it will generally be found that the portion of the highway that is taken is but small,

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or that another highway can be readily laid out, and that the injury caused to the public is but small compared to the loss and injury that would be caused to the individual by the destruction of his buildings or other improvements. These cases also show that the use to which the property has been put is clearly inconsistent with its subsequent use as a highway; and hence it may well be that the public should have interfered when the buildings were being erected, because in those cases the public were clearly warned that the individual was asserting rights adverse to the public, and putting the property to a use wholly inconsistent with its use for public purposes. Such cases, however, form no rule for the decision of the case at bar, which must be viewed in the light of its own facts.

It is true that the plaintiffs paid the city of Dubuque certain sums assessed against the property for the curbing and paving of the streets adjacent to the triangle, but how was knowledge of this fact brought home to the public? Even if knowledge of such fact was chargeable to the public, what duty did such knowledge charge upon the public? The public nor the railroad company could not prevent the city from demanding, or the plaintiffs from paying, these assessments. It was a matter with which they had no concern and no responsibility.

When the city seeks to collect a tax or assessment that is due to it, it is enforcing a proprietary right, or, in other words, is collecting a debt due it, and is not acting for or representing the public in so doing. This Front street reservation was not dedicated to the use of the city of Dubuque, nor of its citizens alone, but was dedicated to the use of the general public. The general public, however, had no right or interest in the assessments collected by the city of the plaintiffs, and could not have interposed to prevent such collection. When collected the general public derived no benefit therefrom. How, then, can it be claimed that the act of the city in making this collection for its own use and

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benefit, binds or estops the general public? The city itself may be estopped, and the supreme court of Iowa has so held; but such estoppel cannot be held to extend to rights and interests which were not represented by the city when doing the act which, it is held, works an estoppel upon the city.

The city of Dubuque, in the exercise of the powers granted by its own charter, had laid out a street over a part of this reservation; that is to say, it extended Iowa street diagonally across Front street. It then required the plaintiffs to pay for the curbing and paving of Iowa and First streets. By these acts of the city it was shown that the city did not include the triangle within the streets laid out by it. Hence it might well be that the city should be estopped from claiming the triangle to be part of its streets; but, in my judgment, that does not work an estoppel upon the public in regard to the use of the remaining portion of Front street. The public does not derive its rights thereto from the city of Dubuque, nor through its acts under its charter, but the same are conferred directly by the act of congress of 1853.

The evidence in this case shows that Front street was for some years used as a levee and public highway, and in 1871 the city granted ordinances authorizing the laying down of railroad tracks over different portions thereof.

Without further elaboration, however, of this point, my judgment is that the facts disclosed by the evidence do not warrant the court in holding that the public are estopped from asserting the right to the use of this triangle for public purposes, or that the rights of plaintiffs are of such a character as to require the court to find an estoppel for their protection.

3. It is urged, however, on behalf of plaintiffs, that the defendant is bound by the decree and judgment rendered in the case of *Simplot v. City of Dubuque*, and is thereby estopped from asserting that plaintiffs have no title to the premises occupied by defendant's track. This claim goes upon the theory that the railway company derives its right

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to occupy the premises in question solely from the ordinance of the city granting the right to the Dubuque, Bellevue & Mississippi Railroad Company to place its track along Front street. Assuming for the moment that the defendant claims only through this ordinance and grant from the city, does it follow that the defendant is bound by the judgment against the city? The ordinance granted by the city to the Dubuque, Bellevue & Mississippi Railroad Company was adopted in 1871. The railroad track was laid and used for railroad purposes in 1874. After such use thereof the plaintiffs herein brought an action against the city alone. The suit, therefore, was commenced after the grant from the city to the railroad company, and after the use and occupation of the premises by the company. How, then, does the result of this suit, to wit, the decree rendered in favor of the Simplots against the city, bar or bind the defendant, even if the latter does hold only under the grant from the city?

In Bigelow, Estop. (3d ed.) 94, it is said:

"Thus an assignee is not estopped by judgment against his assignor in a suit by or against the assignor alone, instituted after the assignment was made, though if the judgment had preceded the assignment the case would have been different. Hence privity in estoppel arises by virtue of succession. Nor is a grantee of land affected by judgment concerning the property against his grantor, in the suit of a third person begun after the grant. Judgment bars those only whose interest is acquired after the suit, excepting, of course, the parties."

If, then, it be the rule that a judgment bars only those whose interest is acquired after the institution of the suit, it is clear that in this case the defendant cannot be barred by the decree in the case against the city, even if the defendant be treated as a grantee of the city. Under the doctrine recognized in *Ingram v. C. D. & M. R. Co. supra*, the defendant gets its right to occupy the premises in question for its railroad track under the provisions of the act of congress of 1836, and the right-of-way act of the state of Iowa; and

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under the rule recognized in this case, following, as it does, the earlier cases of *City of Clinton v. C. R. & M. R. R. Co.* 24 Iowa, 455; *C. N. & S. W. R. Co. v. Newton*, 36 Iowa, 299, the defendant herein is not dependent upon the ordinances of the city as the source of its right to maintain and operate its track over the triangle in question, the same being part of Front street as defined on the commissioners' map of the town of Dubuque; but, on the contrary, without any authority or grant from the city, or even in the face of prohibitory action upon part of the city, the defendant, subject to equitable judicial control, had the right, under the act of congress, to maintain and operate its track in its present location. This being true, it follows unquestionably that the defendant cannot be barred or estopped by the effect of a decree rendered in the case of *Simplot v. City of Dubuque*, as the defendant was neither a party or privy thereto.

Briefly stated the facts are as follows: When the town of Dubuque was laid out, the United States caused a reservation to be made of a strip of land fronting on the Mississippi river, the same being reserved for and dedicated to public use forever, "for the purposes of a highway and for other public uses." This was not a reservation or dedication for Dubuque or its citizens alone, but for the general public. This strip, known then as Front street, was used as a highway and for levee purposes. Subsequently, when railroads came into use in the west, portions of Front street were occupied by the tracks or rails of these companies, and in 1874 the track now owned by the defendant was laid over the triangle in dispute, which it is admitted forms part of Front street as originally laid out. When this track was laid down there was no building, fence, or other erection on the land upon which the track was laid.

The plaintiffs claim that by ten years' or more adverse possession they have defeated the rights of the public in and to this portion of Front street, in such sense that they are now the owners thereof as against the public.

The evidence shows that in all the plaintiffs did in connec-

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tion with this property they acted with full knowledge of the fact that this triangle was part of the public reservation, and was not part of lots 529 and 530, and that through no act on part of the public were the plaintiffs in any way misled or deceived. The plaintiffs have never erected any building or permanent erection upon these premises.

It is shown that plaintiffs, when called upon, paid certain sums for curbing and paving the streets laid out by the city adjacent to the triangle. It is also shown that plaintiffs leased this triangle and received rent for its use, but it is not shown what amount was received for its use. In leasing the triangle, the plaintiffs informed the lessee that their right to the premises might be disputed, and that the plaintiffs would not guaranty his possession.

In my judgment the original dedication by act of congress of Front street to public use cannot be defeated by reason of the facts shown in this case. They fall far short of showing an estoppel upon the public, and hence the plaintiffs fail to show a title or ownership in the premises which would entitle them to claim damages for the use thereof for railroad purposes, under the law as it was in force in 1874. Consequently the proceedings should be dismissed at cost of plaintiffs.

“THE DRIVEN-WELL CASES.”

ANDREWS and others v. HOVEY.

(Southern District of Iowa. May, 1883.)

1. PATENTS — DRIVEN WELL — ORIGINAL PATENT NO. 73,425, AND RE-ISSUE NO. 4,372, VOID — DEDICATION TO PUBLIC — PUBLIC USE — ANTICIPATION. — As the evidence in this case shows that in 1831 Nelson W. Green, who was at that time the colonel of a regiment, in order to supply his men with pure water, devised and put in operation a method of driving wells; that he did not at that time contemplate procuring a patent for his invention, but intended simply to benefit his regiment; that his invention was in open and public

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use, with his acquiescence and consent, for more than four years before he applied for a patent; and that this method of driving wells was known and resorted to by certain other persons in Milwaukee, Wisconsin, in 1849 and 1850, and in Independence, Iowa, in 1861,—the reissued letters patent No. 4,372, granted to said Green under date of May 9, 1871, and the original patent No. 73,425, dated January 14, 1868, for an “improved method of constructing artesian wells,” must be held invalid and void.

2. **SAME — REISSUE VOID.**— When the original invention did not embrace the idea of creating a vacuum in the lining of the well for the purpose of utilizing the pressure of the atmosphere, nor the original patent, expressly or impliedly, cover or describe the application of this principle, the enlargement of the claims in a reissue for the purpose of covering this idea of atmospheric pressure caused by a vacuum in an air-tight tube will render such reissue void.
3. **SAME — REISSUE MAY EMBRACE WHAT.**— A reissue can be validly granted only for the same invention which was originally patented. A reissue that goes beyond this, and covers other and different inventions or improvements suggested by the use of the original invention, will be void.
4. **SAME — PRIOR USE — CONSENT OF INVENTOR — ACT OF 1839 — SECTION 4886, R. S.**— The two-years’ limitation was intended in the act of 1839, as it unquestionably is in section 4836 of the Revised Statutes, to be general, and it applies to all cases in which the invention has been in public use or on sale for more than two years prior to the application, whether with or without the consent or allowance of the inventor. Per LOVE, J., concurring.

NELSON, J., dissents.

In equity.

This suit, with a large number of others against other defendants now pending in this court, is based upon reissued letters patent No. 4,372, granted to Nelson W. Green, one of the complainants, under date of May 9, 1871; the original patent, No. 73,425, bearing date January 14, 1868, and having been issued for an “improved method of constructing artesian wells.” The bill alleges an infringement on the part of the defendant, and prays for an injunction, accounting, damages, and further relief. The answer, in substance, denies that Green was the original inventor of the alleged improvement; avers that the alleged invention was known and in public use for more than two years prior to the date

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of the original letters patent; that Green, if he was an original inventor, abandoned his invention, and knowingly permitted its public use for more than two years before applying for a patent; that the reissue is a departure from the original letters patent, and embraces different and more extensive claims than are covered by the original; and also denies that defendant has infringed upon the rights and invention held and owned by the complainants. As already stated, there are pending in this court a large number of causes brought by the complainants for alleged infringements upon their rights, and in the district of Minnesota similar suits are pending, in which the issues are substantially the same. For convenience's sake it was agreed that these causes should be heard at one and the same time before the judges of the district of Minnesota and the districts of Iowa, and accordingly, at the October term, 1882, of this court, such hearing was had, and the questions at issue were very fully and ably presented, both in print and by oral argument before the court. At that time there was pending before the supreme court at Washington the case of *Wahl v. Hine*, on appeal from the district of Indiana, in which cause this same patent was involved, and it was hoped the decision of that case would give us a final and authoritative decision upon the more important questions discussed in this court. When the judgment in *Wahl v. Hine* was announced, however, it appeared that the judges were equally divided in opinion therein, eight only of the members of that court having sat in the case, and hence no opinion upon the merits was reached or announced in that cause. It became, therefore, the duty of this court to consider the questions submitted, unaided by the decision in *Wahl v. Hine*, and we have endeavored to give them the consideration which their importance demands. Upon many of the questions involved a very large amount of evidence has been adduced, and the questions of law and fact have been ably argued and presented by the counsel in the cause.

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*Stoneman, Rickel & Eastman, Hubbard, Clark & Dawley,
A. R. West and Rogers & Rogers, for complainants.*

Lake & Harman and Wilson & Gale, for defendants.

SHIRAS, *District Judge*.—Assuming for the present that Nelson W. Green is entitled to the credit of being the inventor of what is commonly known as the “driven well,” we shall first consider the defense of abandonment; that is to say, the averment that he allowed the use of his invention to become part of the property of the public, without asserting his right to a patent for the protection of his rights as an inventor.

In the case of *Shaw v. Cooper*, 7 Pet. 292, it was held that “vigilance is necessary to entitle an individual to the privileges secured under the patent law. It is not enough that he should show his right by invention, but he must secure it in the mode required by law, and if the invention, through fraudulent means, should be made known to the public, he should assert his right immediately, and take the necessary steps to legalize it. The patent law was designed for the public benefit, as well as for the benefit of inventors. . . . No matter by what means an invention may be communicated to the public before a patent is obtained, any acquiescence in the public use by an inventor will be an abandonment of his right. If the right were asserted by him who fraudulently obtained it, perhaps no lapse of time could give it validity. But the public stand in an entirely different relation to the inventor. The invention passes into the possession of innocent persons who have no knowledge of the fraud, and at a considerable expense, perhaps, they appropriate it to their own use. A strict construction of the act, as it regards the public use of an invention before it is patented, is not only required by its letter and spirit, but also by sound policy. . . . The doctrine of presumed acquiescence, where the public use is known or might be

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known to the inventor, is the only safe rule which can be adopted on this subject. . . . Whatever may be the intention of the inventor, if he suffers the invention to go into public use through any means whatever, without an immediate assertion of his right, he is not entitled to a patent, nor will a patent obtained under such circumstances protect his right."

In the case of the *Consolidated Fruit-jar Co. v. Wright*, 94 U. S. 96, it is said that: "The inventor must comply with the conditions prescribed by law. If he fails to do this he acquires no title, and his invention or discovery, no matter what it may be, is lost to him, and is henceforward no more his than if he had never been in anywise connected with it. It is made, thereupon, as it were by accretion, irrevocably a part of the domain which belongs to the community at large."

From the evidence in the cause, it appears that in the summer of 1861 Nelson W. Green was a resident of Cortland, New York; that he was engaged in drilling and organizing volunteers for the army, and especially in connection with the seventy-sixth regiment of New York infantry, of which regiment he was appointed colonel; that while thus employed his attention was called to the subject of procuring pure water for the use of his men, and that he set about to devise means by which water could be readily procured from beneath the surface of the earth, thus avoiding danger from poisoned wells and springs, and also from the risk of being cut off from access to the ordinary sources of supply, when in the presence of the enemy. The patentee himself testifies that in the summer of 1861 he had devised, in his own mind, a method of accomplishing this result, which he explained first to his drill squad, and then to the officers of his regiment, and which consisted in driving a rod sharpened at the end into the ground, and into the water-bearing stratum, then withdrawing the same and inserting a tube through which the water could be drawn

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by any ordinary style of pump. As a test of the method proposed, under the direction of Col. Green, an experiment of driving a rod down to the water was made near his house, and this experiment was followed by driving a well at the fair grounds at Cortland, at the expense and for the use of one Graham, who had the contract for furnishing food and other supplies at the camp, on the fair grounds. This well was driven between the first and the fifteenth of October, 1861, and was used generally by the men in camp, as well as by Graham and his employees.

We further find in the testimony of Col. Green the following:

Question 60. "After this experiment at the house, and the making and use of the well at the fair grounds, what was your opinion as to the practicability of making wells by that process, either for general use or for the purpose of the army, as you had originally intended?"

Answer. "The result of the two experiments referred to had upon my mind the effect to convince me of the entire practicability and feasibility of the process for all the purposes named in the question."

Question 61. "Did you take any steps, give any orders or directions for the procurement of material to be taken with your regiment into the field for the purpose of making wells to supply that regiment with water, wherever it might be situated?"

Answer. "I gave Lieut. Mudge orders to procure such material for the purposes named, and gave Adj. Robinson orders to furnish him with transportation for the same, and when at Albany made arrangements with the quartermaster-general for the transportation of that material with the regiment when it went to the front."

By the testimony of the patentee himself it is shown that the invention claimed by him was perfected in conception in the summer of 1861, and was demonstrated to be a success by practical use in October, 1861; that the patentee caused

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the necessary apparatus to be procured to be taken with the regiment for its use when it moved to the seat of war, and arranged with the authorities at Albany for the transportation needed therefor.

The testimony of the patentee shows, beyond the possibility of a doubt, that his object and purpose in 1861 was to provide a means of supplying the men under his care with pure water, and protecting them from the danger to be apprehended from the polluted or poisoned springs and wells, or from being cut off by the enemy from access to the usual sources of supply, and to this end he caused the apparatus to be used in driving wells to be procured, and transportation therefor to be provided.

The sinking of the well at the fair grounds at Cortland, and the providing the means for driving these wells whenever and wherever they might be needed by the regiment, establishes beyond question the intent on the part of Col. Green that this invention should be publicly and commonly used by his regiment at any and all times and places. His own testimony shows that he explained his invention and the means of carrying it into effect, first to his drill squad, and then to the officers of his regiment, and subsequently consented to the sinking and public use of the well at the camp ground, and yet he never cautioned any one to keep the method a secret, nor is it shown that in 1861 he ever mentioned to any one the idea of obtaining a patent, or that he proposed doing so, or that he took any action looking to that end. All that he did tended to spread the knowledge of the mode of making these wells and of the success attending their use, and nothing whatever is shown indicating an intent to restrict the right to make and use the same to himself as a patentee.

It is an admitted fact that Col. Green was a man of intelligence and education, and he must have known what the law required of him, in case he desired to secure his rights as an inventor under the provisions of the patent laws. He

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knew, then, that to secure his rights, if he desired to procure a patent, he must apply therefor before permitting his invention to pass into general or public use. His own testimony conclusively shows that he gave publicity to his invention, and consented to, nay, aided in making, the use thereof common and public. There is nothing in the evidence showing that he purposed or intended to make further or different experiments, with a view to perfecting his discovery. He himself expressly testified that the experiment at his house, and the driving and use of this well at the camp ground, convinced him of the feasibility of the process in making wells either for general or army use, or, as counsel for complainants, in their brief upon the facts, pages 17 and 18, state it: "The two experiments fully and satisfactorily demonstrated the general practicability of the process, where no rock intervenes."

The evidence shows conclusively, therefore, that the invention was thought out and was put into satisfactory use, the use being an open and public one, while Col. Green's regiment was in camp at Cortland; and the necessary machinery and tools, with transportation therefor, were provided for continuing the construction and the open and public use of other wells; and yet no step was taken by Col. Green for the procurement of a patent, nor was there at that time any act done, or statement made, indicating a purpose or intent upon his part to apply for a patent in the future.

It is urged, however, that the reason why an application for a patent was not made at that time was because Col. Green had become involved in serious difficulties on account of the shooting of Capt. McNett, one of the officers of his regiment, on the sixth of December, 1861. If it appeared from the evidence that Col. Green had, in the fall of 1861, taken the initiatory steps for the procurement of a patent, or had even unmistakably announced his intention so to do, and it appeared that the accomplishment of such purpose

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was interrupted by the complications and difficulties arising out of the shooting of Capt. McNett, it might then be claimed that these difficulties formed an excuse for the long delay in applying for a patent on the part of Col. Green. But it will be borne in mind that the idea of this mode of constructing a well was thought out in the summer of 1861, and the well at the camp ground was sunk before the fifteenth of October, and the shooting of McNett was not until December 6th.

It is also shown by Col. Green himself that he gave the proper orders for the construction of the apparatus necessary to be used in sinking wells, and that when in Albany, he arranged for the transportation thereof with the regiment when it moved to the seat of war. If he thus had time and opportunity enough to provide the means necessary to furnish these wells for the common and public use of his regiment, can it be fairly claimed that he did not have time and opportunity to at least announce his purpose of procuring a patent, if such was then his intent?

It would seem that the utmost that can be said of the effect of the difficulties resulting to Col. Green from the shooting of Capt. McNett is, that thereafter his attention was so fully occupied thereby that he gave no further thought to the subject of driven wells at that time, and hence did not, in his own mind, reach the conclusion that he would apply for a patent, until several years had elapsed and these difficulties had begun to pass away, and until it was brought to his attention that, through the use of this mode of driving wells, other parties had reaped large pecuniary benefits. But during this delay, extending to May, 1866, a period of over four years, the public had acquired rights through the open and uninterrupted use of the discovery. What the causes were that led to this long silence on the part of Col. Green are not so material as the fact itself that he made public the knowledge and use of his invention, and then for over four years remained wholly silent, and took no action for the pro-

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curement of a patent. Can there be any question that Col. Green did permit his invention to go into public use without an immediate assertion of his rights?

In *Egbert v. Lippmann*, 104 U. S. 333, it was held that "to constitute the public use of an invention it is not necessary that more than one of the patented articles should be publicly used," it being also held in the same case that "if an inventor, having made his device, gives or sells it to another, to be used by the donee or vendee without limitation or restriction or injunction of secrecy, and it is so used, such use is public, even though the use and knowledge of the use may be confined to one person."

It is not questioned that the well at the camp ground was made with the knowledge and consent of Col. Green. It was for a public use, being constructed at the expense of the sutler, Graham, for the purpose of supplying water for use in the cook-rooms, as well as for general use by all connected with the regiment. There was no effort made to keep the mode of its construction secret, but rather the contrary. When the regiment left Cortland, New York, Col. Green exercised no control over this well, nor did he cause it to be taken up or otherwise kept from public use or knowledge. If he was the inventor of that description of well he certainly gave to Graham the full right to construct and use the well, and to permit its use by others, without any limitation whatever or any injunction of secrecy, thus bringing the case within the rule laid down in *Egbert v. Lippmann*, even if there were no further facts showing acquiescence in the public use of the invention. But these facts are not wanting, for it is proven by Col. Green himself that he caused the necessary tools and pipes to be procured for the use of the regiment when it went to the front, showing clearly that he proposed and intended to permit any number of wells to be sunk and used that might be needed by the regiment, thus showing that he contemplated a continuous public use of the invention without restriction or limitation.

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Again, the evidence shows that a large number of driven wells were made and used in and about Cortland and neighboring places during the years 1862, 1863, 1864 and 1865. It is now claimed that Col. Green had not actual knowledge of the existence of these wells, but was he not bound to know that the natural result of what he himself had done and had caused to be done in the way of giving publicity to the success which attended this mode of making wells would be to spread their use by the public unless he promptly prevented such result by procuring a patent? and can he now be heard to say that he did not know or have any reason to know that the use of the wells was becoming common in his own neighborhood when the facts show that such use was the natural result of his own acts. But we are not left to mere inference upon this question, as there is testimony showing satisfactorily that he had knowledge of the existence of a portion, at least, of these wells; and, despite his own testimony, wherein he endeavors to destroy the weight of this evidence, either by direct denial or by claiming that he did not in fact recognize certain wells which came under his notice to be driven wells, yet we think the preponderance of evidence is against him on this proposition, and that it must be held that he knew that such wells were being made and used.

We find, therefore, as conclusions of fact:

(1) That in 1861 Col. Green's purpose in devising his method of driving wells was to furnish a ready means whereby the men of his regiment could procure a supply of pure water, and that he did not at that time contemplate procuring a patent therefor, and that he put his method of driving wells into public use in 1861 for the benefit of his regiment, and thereby dedicated or abandoned his invention to the public.

(2) That his invention was in open and public use, with his knowledge and acquiescence, for more than four years before he applied for a patent thereon.

From these conclusions of fact it necessarily follows that

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the letters patent originally granted, and the reissued letters based thereon, must be held invalid and void.

2. It is also urged on behalf of defendants that the reissued patent enlarges the scope of the original patent, is broader in its terms, including improvements and principles not contained in the original specifications, and is therefore void. This defense demands an examination and determination of what Col. Green's original invention consisted, and of what is embraced within and covered by the reissued patent. We will consider the latter proposition before proceeding to the former. William D. Andrews, one of the complainants, in giving his testimony, is asked whether he has read and understands the reissued patent, and, if so, to describe it, which he does in the following language:

"The invention is for a method of procuring water from the earth by means of a tube inserted into the earth down to and into a water-bearing stratum, and attaching to such tube, in cases where the water does not flow naturally, a pump by an air-tight connection, and by the operation of the pump producing a vacuum within the tube, which forms the body of the well and its lining, thereby causing the water in the surrounding earth, under the pressure of the atmosphere, to rush into the well formed by the tube, and furnishing a practically inexhaustible supply of water by the means as stated and described."

In the opinion of Judge Benedict in the *Carman Case*, cited at length by complainants, it is stated that "the novelty consists in making the well-pit to consist of the tube of a pump connected tightly with the earth. This is accomplished by driving into the earth the tube to be used as a tube of a pump and at the same time as the pit of the well. This manner of inserting the tube renders it possible, by means of a pump attached to the tube, to create a vacuum in the pit of the well, and at the same time in the water-bearing stratum of the earth."

In the printed argument of counsel for complainants it is

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said that "the drive-well invented by Col. Green left no open space between the lining and the suction pipe, and is based upon the principle that if a vacuum is formed in the earth at the ordinary depths by the action of the suction pump, the atmospheric pressure communicated through the earth to the water will cause it to respond to the vacuum produced within the well, whose lining is itself the suction pipe of the well, and perfectly air-tight, the earth serving as a filter."

It is not necessary to extend these quotations to show that the principle which it is claimed constitutes the discovery or invention of Col. Green, as described in the reissued patent, is that the production of a vacuum in the earth by means of an air-tight tube driven into the earth, to which is attached a suction pump, will greatly increase the supply of water.

To produce this vacuum it is necessary that the tube forming the lining of the well should be in such close contact with the surrounding earth as to be air-tight; and it is claimed that driving the tube into the ground, whether with or without originally perforating the earth with a rod, constitutes a mode of constructing a well which practically results in producing a well whose lining—to wit, the tube—is in air-tight connection with the earth. In other words, in order to successfully apply the principle, it is absolutely essential that the tube forming the lining of the well should be in such close contact with the earth that the air cannot pass down around the outside of the tube, and the pump used in drawing up the water must also be attached to the end of the tube by an air-tight connection. Unless both of these conditions are fulfilled it is impossible to create a vacuum in the tube, and about the portion of it inserted in the water-bearing stratum; and as the creation of this vacuum is the essential and only means of applying the principle which it is claimed constitutes the chief merit of Col. Green's invention or discovery, it follows that in order to protect such a discovery by a patent it must be included

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within the specifications. This may be done by either a proper description of the result to be obtained, with the mode or means to be employed in producing the same, or by simply describing the means employed to accomplish the result; that is to say, it would be sufficient if it was stated that, by the use of certain prescribed means, a vacuum in and about the tube would be created, and thereby the supply of water would be increased, or if it was stated that the tubing of the well was so driven as to be made air-tight by contact with the surrounding earth, and the pump to be used was affixed to the tube by an air-tight connection. In the latter case the result reached or the principle put into operation would not be described; but as the means described must necessarily produce the result, or apply the principle, it is held sufficient to describe the means employed, without specifying the principle which is thereby brought into play. Indeed, it is not necessary that the inventor, to be entitled to a patent, should himself understand the abstract principle which his invention brings into use. It is sufficient if he is the inventor of a means whereby a new and useful application of the abstract principle is brought about. Still, as already remarked, it is necessary that in the patent and specifications the new and useful application of the principle must be described, either by setting forth the result obtained, with the means of its accomplishment, or else by such a description of the means employed as will, if followed, necessarily produce a result which embodies the practical application of the principle involved.

Let us now examine the specifications originally filed by Col. Green, and see whether there is embraced therein the application of the principle of utilizing atmospheric pressure through the creation of a vacuum in the tube and the earth surrounding it, where it penetrates the water-bearing stratum. The description of the invention is set forth in the following language:

“My invention consists in driving or forcing an iron or a

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wooden rod with steel or iron point into the earth until it is projected to or into the water, and then withdrawing the said rod and inserting in its place a tube of metal or wood to the same depth, through which and from which the water may be drawn by any of the usual well-known forms of pumps."

Finally, in setting forth his claim, he does so in the following terms:

"Having thus fully described my invention, what I claim and desire to secure by letters patent is the herein described process of sinking wells where no rock is to be penetrated, viz., by driving or forcing down a rod to and into the water under ground, and withdrawing it and inserting a tube in its place to draw the water through, substantially as herein described."

It certainly cannot be successfully claimed that in these statements it is set forth in express terms that the principle to be utilized is the atmospheric pressure forcing the water to and into the tube through the agency of a vacuum created in the tube and in the earth at the lower end of the tube, where it penetrates the water-bearing stratum. There is not to be found in any part of the specifications any reference to a vacuum, either in or out of the tube, nor any mention of atmospheric pressure created thereby. If the application of this principle formed the material and all-important part of Col. Green's invention in 1861, as is now claimed in argument, he certainly failed to set it forth in express terms in his specifications forming part of the original patent; nor can it be inferred from the description of the means to be employed that he then proposed to create a vacuum by making the well lining air-tight, and by attaching a pump thereto by an air-tight connection. He describes a driving rod, having a swell thereon, which is to be driven into the ground and then withdrawn, and a tube of a diameter somewhat smaller than the diameter of the swell of the drill rod is to be inserted in the hole thus

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made. In no part of the description is it said, either expressly or by fair implication, that the tube, when inserted, must fit so closely into the opening made by the rod that no air can pass down on the outside of the tube to the water, nor is it stated that the pump must be attached by an air-tight connection to the top of the tube. A person can follow with exactness all the instructions therein given, and yet it would not necessarily follow that he had excluded the air from the lining of the well, or from the water-bearing stratum at the place where the tube penetrated the same. In other words, the description of the means to be employed, as set forth in these specifications, does not show that one of the results arrived at is to render the lining of the well air-tight, and to have attached thereto a pump by an air-tight connection. The description of the means to be employed can be carried out in practice without making an air-tight lining or tube, and hence without forming a vacuum around the bottom of the tube or in it. This being true, it follows that it cannot, from the description of the means employed, be inferred that Col. Green then intended to claim, as part of his discovery or invention, the application of the principle that by creating a vacuum in and about the tube, the same having been made air-tight, the flow of water would be largely increased. He did not claim it in express words, and the description of his invention, and the means to be used in carrying the same into practical use, fail to show that such was the main or even a necessary part of his invention.

In our judgment his invention or discovery is fully and fairly described in the language of his own claim, to wit:

“What I claim and desire to secure by letters patent is the herein-described process of sinking wells where no rock is to be penetrated, viz., by driving or forcing down a rod to and into the water under ground, and withdrawing it and inserting a tube in its place to draw the water through.”

What he sought to accomplish was to devise a rapid, easy

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and feasible means of reaching an underground supply of water in such a mode that any ordinary pump could be applied to bring it to the surface, and his plan was to drive down a rod into the water, withdraw it, and then insert a tube, through which the water could be drawn by any ordinary kind of pump. In our judgment the evidence introduced by complainants shows that this was all that Col. Green sought to do in 1861, and that in making his experiments at that time he did not contemplate or conceive of the idea that the tube should be made air-tight so as to create a vacuum in it and about it, and thereby utilize the atmospheric pressure. Hence it is that in the specifications attached to the original patent no mention is made of atmospheric pressure, or of a vacuum in and about the tube, nor is it stated, in describing the means to be employed in making the wells, that the tube must be air-tight in its connection with the surrounding earth, or that the pump must be attached thereto.

It is inexplicable, if it was intended to embrace in the original patent the operation of atmospheric pressure in the earth, through the creation of a vacuum, which is now claimed to constitute the chief features and merit of the driven well, that the specifications contain no reference thereto, either expressly or even by fair implication.

We conclude, therefore, that the original patent cannot be so construed as to embrace the application of this principle.

Turning now to the specifications of the reissued patents, what do we find? In the first place, it is stated "that the hole or opening is made by the mere displacement of the earth, which is packed around the instrument, and not removed upward from the hole, as it is in boring." And it is further said that "I prefer to employ a pointed rod, which, after having been driven or forced down until it reaches the water, I withdraw, and replace with a tube made air-tight throughout its length, except at or near its lower end." And further, "I attach to the tube by an air-tight connection

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any known form of pump." In these portions of the specifications we find it provided that the earth must be packed around the tube forming the lining of the well; that this tube must be air-tight throughout its length, except at or near the lower end, which penetrates the water, and the pump used therewith must have an air-tight connection with the tube. Under these specifications it is claimed by complainants that the main feature of the discovery consists in the utilization of the atmospheric pressure through the creation of the vacuum in and about the tube. (See questions 11 and 12, testimony of William D. Andrews, pp, 210, 211, vol. 1 of complainant's record.) Giving these specifications the constructions which complainants put thereon, it follows that the reissued patent covers (1) the process of sinking wells by forcing down a rod or tube to the water-bearing stratum without removing the earth upwards, as in boring or digging; (2) creating a vacuum in the tube forming the lining of the well, by making the tube air-tight except at the lower end, compacting the earth around the tube, and by attaching a pump with an air-tight connection to the tube.

In the argument of counsel, as well as in the testimony of complainants, it is urged that the great merit of Col. Green's invention consists of the discovery of the effect of the vacuum thus created. According to the view we take of the original patent, it did not cover or describe the application of this principle. It follows, therefore, that the reissue embraces the application of an important and material principle, not found in the original.

The rule is well settled that a reissue can be validly granted only for the same invention which was originally patented. If the reissue goes beyond this, and covers other and different inventions or improvements suggested by the use of the original invention, it will be void. See *Burr v. Duryee*, 1 Wall. 531; *Manuf'g Co. v. Ladd*, 102 U. S. 408; *Miller v. Brass Co.* 104 U. S. 350; *James v. Campbell*, id. 356; *Manuf'g Co. v. Corbin*, 103 U. S. 786.

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As we view the evidence in this case, we find that Col. Green in his original invention did not embrace the idea of creating a vacuum in the lining of the well for the purpose of utilizing the pressure of the atmosphere, nor did his original patent, either expressly or impliedly, cover or describe the application of this principle; that this idea of utilizing the atmospheric pressure was an after-thought on the part of complainants; that to protect it as a part of Col. Green's invention it was evidently necessary that the specifications should be enlarged; that the reissue was obtained for the purpose of covering thereby this idea of atmospheric pressure caused by a vacuum in an air-tight tube; that the complainant now claims that the chief merit of the invention consists in creating a vacuum in the tube and the earth surrounding it, where it penetrates the water-bearing stratum, and, through the pressure of the atmosphere, forcing a larger and more continuous supply of water into the tube forming the lining of the well, and that the application of this principle is provided for and embraced within the specifications of the reissued letters patent. Giving these specifications the construction claimed therefor by complainants, it follows, in our judgment, that the reissue departs widely from the original, and embraces the application of a principle not covered by the original invention of Col. Green, and consequently that the reissued patent must be held void. In determining this question of the validity of the reissued letters patent, we have assumed that the construction put thereon by complainants and their counsel is legally correct, to wit, that there is embraced therein the principle of utilizing atmospheric pressure by creating a vacuum in the tube and about the same where it penetrates the water-bearing stratum. We have also assumed, without questioning it, that the theory of complainants in regard to the creation of a vacuum about the tube, and its effect in increasing the flow of water into the tube through the pressure of the atmosphere upon the other portions of the water-bearing

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stratum, is correct. In the view we have taken of the case, it has not been necessary to investigate fully the scientific points involved in the latter proposition, but we will only say that the experiments made before the court, and the evidence adduced on this question in physical science, have not fully demonstrated to our satisfaction the correctness of the theory relied upon by complainants.

3. Upon the issue of originality of invention by Col. Green a large amount of evidence has been adduced, with a view of showing that this method of sinking wells had been substantially described in various publications antedating Col. Green's discovery, and also that wells had been sunken by this method at different times and places. We do not deem it necessary to specially mention more than two of these alleged prior discoveries. While it cannot well be questioned that it is shown that in some of the other instances a near approach was made to the method subsequently adopted by Col. Green, yet we do not think that it can be said that these isolated instances were anything more than mere experiments, not developed to an extent sufficient to enable the court to say that they clearly anticipated Col. Green's discovery. There are two instances, however, which cannot be so summarily disposed of, these being: *First*, the well at Independence, Iowa; and, *second*, the wells driven at Milwaukee, Wisconsin, by E. W. Purdy.

In regard to the well at Independence, the query is whether it was in fact constructed in 1861, as claimed by defendants, or in 1866, as averred by complainants. The defendants claim that there were two wells driven at Independence,—one in the early summer of 1861, the other in 1866,—while the complainants aver that there was but one well, *i. e.*, the one driven in 1866, and that the witnesses who place it in 1861 are simply mistaken in the date. In several of the cases heretofore heard, touching the validity of Col. Green's patent, the question in regard to this Independence well has been presented, and it has been therein held that the conflict

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in the testimony was to be reconciled by holding that the witnesses for the defendants, while testifying truthfully to the existence and character of this well, had mistaken the date, and placed an event in 1861 which really took place in 1866. If the evidence submitted to us was substantially the same as that submitted in the cases referred to, we should not feel disposed to re-examine the question at issue, but we have had presented to us much additional evidence largely intended to prove the date of the driving of the well in question, by proving the date of other facts which are so connected with the existence of the well that proof of the date of the former unmistakably fixes the time when this well was driven and in use. Thus a number of witnesses who probably could not by a mere effort of memory fix the month or the year when they saw and used the well, testify to facts which corroborate their recollection that they saw and used this well when the soldiers were enlisting at Independence and forming companies commanded by Cpts. Lee and Hord, for the purpose of entering the Union army. That these companies were organized at Independence in the year 1861 is a fact beyond dispute. So with other facts, the date of which is not open to question, such as the time when Sherwood and Kimball kept the hotel at Independence, the date of Col. Lake's marriage, the use of the well by the cricket club when playing cricket upon the grounds adjoining the lot where the well was driven, and which club was broken up by a number of its members entering the army in 1861. By such facts as these the defendants have greatly strengthened their position in regard to this well at Independence, and while it cannot be doubted that there is much plausibility in the argument urged against the reliability of this evidence, still it seems to us that the preponderance of the evidence upon this question is with the defendant, and that it must be held as a conclusion of fact (1) that in the early part of the summer of 1861 there was constructed at Independence, Iowa, a driven well which proved a success;

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(2) that this well was constructed by driving a tube down into the water-bearing stratum, and attaching to the tube a pump by which the water was drawn up through the tube in apparently an inexhaustible quantity.

It does not appear, however, that any other wells came into use by reason of the driving of the one under consideration, and if the decision of the court depended solely upon the effect to be given to the driving of this one well, we might well doubt whether it would not be proper to treat it as a mere isolated experiment, which would not be held to defeat the rights of an independent inventor. In regard to what may be called the Milwaukee wells, it is shown by the testimony of E. W. Purdy that in 1849 and 1850 he was in the business of making wells at Milwaukee, Wisconsin; that he used iron rods about two inches in diameter, and made so they could be coupled together. The first rod was about sixteen feet long, the lower end being in shape of a drill. This rod was worked up and down by a rope running over a gin-pole, the rod being raised up and down, and in that way the earth was displaced by the rod as it went down. Tubing of about four inches in diameter was driven down as the rod progressed. This tube formed the lining of the well. No earth was removed upwards, except in case of striking quicksand, when a long sheet-iron bucket, with a valve in the bottom, was used to bring up the quicksand. When the tube had been forced down into the water, if the water did not come to the surface a pump was used, the tube to which the pump was attached being placed inside the tube first forced down, the latter forming the lining of the well. It is shown by the testimony of Purdy that he drove a large number of these wells, and the places where and the parties for whom they were driven are given in several instances. In some cases the wells were driven to the depth of sixty and one hundred feet. In these wells thus driven there was used — *First*, a rod for puncturing the earth, which was driven down to the water-bearing stratum;

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second, into the aperture thus made a tube was forced, which was in close contact with the earth and which formed the lining of the well, and through which the water either flowed naturally, or was drawn by the aid of a pump inserted therein. Comparing this method of driving wells and its results with that adopted by Col. Green in 1861 and described in the specifications attached to the original letters patent, we confess our inability to see any substantial difference. What he expressly claimed in his original specifications was the process of sinking wells by driving or forcing down a rod to and into the water under ground, and withdrawing it, and inserting a tube in its place to draw the water through, and it is just this process in substance that was employed in Milwaukee.

These wells driven at Milwaukee cannot be set aside as abandoned experiments. Purdy testifies that he was engaged in sinking them as a regular business. Numbers were put into practical use. This testimony remains uncontradicted, and it is not claimed that these wells are a myth. If, then, it be true that in 1849 and 1850 wells were driven at Milwaukee by a process not distinguishable from that devised by Col. Green in 1861, and these wells were driven, not as mere experiments, nor for the purpose of exhibition, but for public and continuous use, and from aught now shown may be in use to-day, can any other conclusion be reached than that Col. Green was not the original or first inventor of the process of driving wells described in his specifications? In our judgment the method pursued in sinking these wells at Milwaukee is the same in substance as that devised by Col. Green, differing only in minor particulars, and hence it follows that Col. Green's process for driving wells was only a reproduction of a method which had been devised and put to practical public use fully ten years before Col. Green hit upon the same expedient. If this be true, then it necessarily results that the defense of want of novelty must be sustained.

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The conclusions we have reached upon the points already discussed render it unnecessary to consider the other questions, including that of infringement, which are presented in the record. Under the view we have taken of the case it follows that complainants' bill must be dismissed, with costs, and it is so ordered.

LOVE, *Circuit Judge (concurring)*.—I concur fully in the opinion just delivered by my brother Shiras, and I can add nothing to what he has said touching the points which he has considered. I purpose, however, to give my own views upon one question which has not been discussed in the opinion. The respondent sets up the defense among others that the alleged invention of Col. Green was in public use for more than two years prior to his application for a patent, and after the time when, as Col. Green claims, his invention was perfected. But the complainants insist that this defense cannot be maintained, because one of its essential conditions is that the public use for two years must have been with Green's knowledge and consent, and the complainant contends that the defendant has failed to establish the fact of Green's knowledge and consent. If it were necessary, in my view, to the decision of this point, I would be compelled to find the fact to be that Green did know of the use of the invention for more than two years prior to his application. In my judgment, the preponderance of evidence, both direct and circumstantial, shows that Green did know the fact that driven wells, substantially the same as his, were in public use for a period of more than two years before he made his application.

Several witnesses, apparently credible, against Green alone testify to facts showing directly Green's knowledge and acquiescence in the use of his invention for the time mentioned. Besides, it appears that quite a number of driven wells were put down and used in the town of Cortland, New York, where Green lived, for more than three years before he filed

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his application, and it is difficult to see how Green could have been ignorant of such a fact, considering the deep interest he must have felt in its results. But, in my judgment, it is unnecessary to this defense to find that Green knew of and assented to the use of his invention for the period in question. Green's original patent was issued when the act of 1839 was in force, and it is clear to my mind that, according to the true construction of that act, a public use of an invention for two years, without the consent of the inventor, is sufficient to invalidate the patent.

The seventh section of the act of 1839 (5 St. at Large, 353) provides that: "Every person or corporation who has, or shall have, purchased or constructed any newly-invented machine, manufacture or composition of matter, prior to the application of the inventor or discoverer for a patent, shall be held to possess the right to use, and vend to others to be used, the specific machine, manufacture or composition of matter so made or purchased, without liability therefor to the inventor, or any person interested in such invention; and no patent shall be held to be invalid by reason of such purchase, sale or use prior to the application for a patent as aforesaid, except on proof of abandonment of such invention to the public, or that such purchase, sale or prior use has been for more than two years prior to such application for a patent."

The section just quoted was no doubt intended as an amendment of the sixth section of the act of 1836, as follows:

"That any person or persons having discovered or invented any new and useful art, machine, manufacture, or composition of matter, or any new and useful improvement on any art, machine, manufacture, or composition of matter, not known or used by others before his or their discovery or invention thereof, and not at the time of his application for a patent in public use or on sale with his consent or allowance as the inventor or discoverer, and shall desire to obtain an exclusive property therein, may make application in writing

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to the commissioner of patents expressive of such desire, and the commissioner, on due proceedings had, may grant a patent therefor."

What is the true construction of the seventh section of the act of 1839 just quoted? Is it essential to a defense set up under that section that the "sale or prior use" of the invention for more than two years before the application for a patent should be with the inventor's "consent or allowance?"

In the case of *Egbert v. Lippmann*, Blatchford, J., said:

"The effect of the act of 1839 is to require that an inventor shall not permit his invention to be used in public at a period earlier than two years prior to his application for a patent under the penalty of having his patent rendered void by such use. Consent and allowance by the inventor are not necessary to such invalidity."

The decree in this case was affirmed by the supreme court of the United States. 104 U. S. 333. Mr. Justice Woods, in delivering the opinion, says that, "Since the passage of the act of 1839, it has been strenuously contended that the public use of an invention for more than two years before such application, even without his (the inventor's) consent and allowance, renders the letters patent therefor void. It is unnecessary in this case to decide this question, for the alleged use of the invention covered by the letters patent to Barnes is conceded to have been with his express consent."

It is, therefore, to say the least, an open question whether or not the consent of the patentee to the public use is a condition essential to the defense in question. For my own part, I must say that, but for the doubt thus cast upon the construction of the seventh section of the act of 1839, I could not possibly entertain a question about it.

Upon what principle of construction may we attempt to interpolate the significant words "consent or allowance" into the statute? These words do not appear in the statute. No such condition is expressed as these words imply. The plain, simple and unqualified provision is that "no patent

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shall be held to be *invalid* by reason of such purchase, sale or use prior to the application, except on proof of abandonment of such invention to the public, or that such purchase, sale or prior use has been for more than two years prior to such application for patent." Not a word is here used to the effect that such prior use or sale shall be with the "allowance or consent" of the patentee. If we get such a condition into the section we must do it either by construction or interpolation. Now, the interpolation of material words into a statute is ordinarily an act of simple violence. It is a settled rule in the interpretation of contracts and statutes that their meaning and intent must be ascertained from all and not from a part of the words of the act or instrument. It would do violence to this rule in the construction of a statute to cast out certain words and consider only what remained. And surely we may, with much stronger reason, say that it would be wholly inadmissible to incorporate into a statute words not found in it, and thereby give the act a meaning and construction wholly different from that which it would bear without such interpolation.

It may not be amiss here to note what a celebrated writer upon the law of nations says upon the interpretation of treaties:

"The first general maxim of interpretation is that it is not permitted to interpret what has no need of interpretation. When an act is conceived in clear and precise terms, when the sense is manifest and leads to nothing absurd, then there can be no need to refuse the sense which a treaty naturally presents. To go elsewhere in search of conjectures in order to restrain or extinguish it is to endeavor to elude it. If this dangerous method be at once admitted, there will be no act which it will not render useless." Vattel, Law Nat. book 2, c. 17, p. 368.

Now, what is there in the clause in question that needs interpretation? It is plain and unambiguous. It is free from obscurity. Does the language of the clause, when

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received in its obvious sense, lead to any absurd result? Would it, when so taken, work such gross and palpable injustice as to lead the mind to conclude that the legislature intended it to be received in some other and different sense? On the contrary, the legislature had, in my opinion, a wise purpose in fixing a period of limitation which should not depend upon the uncertainty of the patentee's consent. Its purpose was to require some degree of diligence from the inventor in the assertion of his rights, and to give him full protection when he exercised that diligence; and at the same time to protect the public in the exercise of rights acquired where the patentee should, by reason of his own negligence, fail even to file his application for a patent for a period of two years. The legislature may justly have considered a period of two years from the completion of the invention quite a sufficient time to enable the inventor to make his application. No injustice could possibly arise to him from such a rule, except as a consequence of his own negligence. What but negligence could lead an inventor to delay the assertion of his claims for more than two years from the maturity of his right? And was it the intention of congress to protect him against the consequences of his own negligence? If the complainants' construction is to prevail, there is no time whatever prescribed within which, without the inventor's own consent to the use, he is required to make his application for a patent. The inventor could, under this construction, by simply refusing his consent, withhold his invention from public use for an unlimited time after bringing it to perfection. He might, after the lapse of many years, and after his invention should be in general use, by simply denying his consent, or by mere silence, obtain a patent, and thus override and prejudice intervening investments and industries, unless, indeed, a case of abandonment could be made out. This, it is easy to see, would be against sound policy as well as private justice. The public interest would be prejudiced and individuals injured

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without real benefit to the inventor, since his true interest would certainly not be promoted by the delay.

Congress did, indeed, in the act of 1836, give to the inventors and discoverers the right to apply for a patent without limit as to time, after they were in public use or sale, when without their own consent or allowance. But the unwisdom of this provision becoming apparent, congress, in the act of 1839, changed the law by prescribing a fixed period of limitation and omitting the words requiring the inventor's "consent or allowance" to the use or sale of his invention. The intention of congress, in the act of 1839, is further illustrated by section 4886 of the Revised Statutes. It will appear by inspection of this section that it embodies so much of the seventh section of the act of 1839, and the sixth section of the act of 1836, as it was the purpose of congress to preserve; and that while the two years' limitation is in express terms re-enacted in the forty-eight hundred and eighty-sixth section of the revision, the qualifying words requiring the consent or allowance of the inventor used in the act of 1836 are entirely omitted. The section is as follows:

"Sec. 4886. Any person who has invented or discovered any new and useful art, machine, manufacture, or composition of matter, or any new and useful improvement thereof, not known or used by others in this country, and not patented or described in any printed publication in this or any foreign country, before his invention or discovery thereof, *and not in public use or on sale for more than two years prior to his application*, unless the same is proved to have been abandoned, may, upon payment of the fees required by law, and other due proceedings had, obtain a patent therefor."

It will not, I suppose, be doubted that the two years' limitation clause in the seventh section of the act of 1839 must receive precisely the same construction as the two years' limitation clause in section 4886 of the Revised Statutes. The language of this clause in the two sections being

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substantially the same, and the purpose of the legislature the same, it follows that the construction must be the same.

Now, does any one for a moment suppose that the words "and not in public use or on sale for more than two years prior to his application," in section 4886 of the revision, will bear the construction that the two years' public use, in order to invalidate the patent, must be with the "assent or allowance" of the inventor? Will any court ever interpolate the words "assent or allowance" into section 4886 thus: And not in public use or on sale "*with the assent or allowance of the inventor*" for more than two years prior to his application? What possible reason could have moved congress to provide that the public use, in order to defeat the patent and vest a right to use the invention in the public, should continue for two years, if that public use was to be with the consent and allowance of the inventor?

The act of 1839 must, I think, have been specially intended to apply to a class of persons who should make, use and vend the "machine, manufacture or composition of matter" before the application, without the allowance or consent of the patentee. The seventh section of that act, it will be observed, provides substantially that any person who has or shall have constructed or purchased such newly-invented thing prior to the inventor's application shall have the right to use and vend to others such specific thing, without liability to the inventor or other person interested in the same. Now this must surely refer to persons who should construct or purchase the newly-invented thing without the inventor's consent or allowance, because, if it were constructed or purchased with the inventor's allowance and consent, he could not, on general principles, make them liable as infringers.

This particular provision of the seventh section was, therefore, wholly unnecessary and nugatory except as a protection to those who should invade the inventor's right without his "consent or allowance" before the application. And can it

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be doubted that the words which immediately follow in the same section refer, in part at least, to the same class of persons, namely, those who should purchase or make the inventor's "machine, manufacture or composition of matter" without his consent or allowance? Can it be questioned that the provision that "no patent shall be held to be invalid by reason of *such* purchase, sale or use prior to the application for a patent, etc., except on proof that *such* purchase, sale or prior use has been for more than two years prior to such application," was intended to embrace at least the class of cases referred to in the immediately preceding part of this section? In my opinion this two years' limitation was intended in the act of 1839, as it unquestionably is in the forty-eight hundred and eighty-sixth section of the Revised Statutes, to be general, and that it applies to all cases in which the invention has been in public use or on sale for more than two years prior to the application, whether with or without the consent or allowance of the inventor.

It is obvious, from the plain reading of the act of 1836, that under its provisions an inventor who permitted or allowed the public use or sale of his invention up to the time of his application, was not entitled to protection, for the unavoidable implication from the language is that he should not be entitled to a patent. The law would not permit him to call to account as infringers persons whom he had allowed to use his invention, and, perhaps, invest their money in it, before he gave notice of his intention to claim it by making his application.

The class of persons, therefore, who used or sold the "art, machine, manufacture, or composition of matter" with the consent of the inventor, were fully provided for and protected by the act of 1836. But there was another class not provided for by that act, namely, those who should use, purchase or sell the thing invented without the inventor's consent before his application. The public use did not, under the statute of 1836, preclude the inventor from his

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right to a patent and his right to call infringers to account where his invention was used before the application without his allowance or consent. Yet it is obvious that the latter class of persons might have a certain equity which the law ought to protect, and the primary object of the seventh section of the act of 1839 seems to have been the protection of those who might before the application, without the inventor's consent, use his invention and perhaps invest money in it. Hence, the seventh section of that act provides that "any person or corporation who shall, or shall have, purchased or constructed any newly-invented machine, manufacture, or composition of matter prior to the application by the inventor or discoverer for a patent, shall be held to possess the right to use, and vend to others to be used, the *specifio* machine, manufacture, or composition of matter so made or purchased without liability therefor to the inventor or any person interested in such invention." If the statute had stopped here a possible inference might have arisen that a patent issued to an inventor, where his invention had been on sale or in use even without his consent, would be held invalid. This would have been unjust to the inventor. It was his own fault or negligence if his invention came into public use with his own consent or allowance, and the act of 1836 denied him relief against the consequence of his own fault or negligence. But it was the manifest purpose of the act of 1839 to guard carefully against any possible implication that the sale or use of the invention, without the inventor's consent or allowance, should deprive him of his right to a valid patent. Hence it is further provided in same clause of section 7, following the words just quoted, that "no patent shall be held to be invalid by reason of such purchase, sale or use prior to the application for a patent," except what? Except on proof of abandonment, or on proof that such purchase, sale or prior use has been for more than two years prior to such application for a patent.

Now, what follows from this analysis of the two statutes?

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Is not the inference plain and irresistible that the purchase, sale or prior use of the things invented for two years before the application, without the assent and allowance of the inventor, would invalidate the patent? Can we here interpolate the words "with the assent and allowance" of the inventor, seeing that the very object of the thirty-ninth section was to provide for a class of cases in which the invention should be used without the inventor's consent or allowance? The clause of the act of 1839 in question here is, I think, a statute of limitation, and all such statutes are founded rather upon considerations of public policy than private justice. And where no exceptions are made in the statute itself, it is not competent for the courts to introduce them. If married women, infants, and other persons under disability were not excepted from the provisions of a statute of limitations, no court could incorporate into the statute a saving clause in their favor.

Standing upon the broad grounds of public policy it matters not that a statute of limitations may work injustice in particular cases. If my construction of the seventh section of the act of 1839 be correct, it is decisive of the present case, since it is established by the evidence beyond doubt that Green's invention was in public use for more than two years prior to his application for a patent.

NELSON, *District Judge (dissenting)*.—I dissent from the conclusions and judgment of my associates, Judges Love and Shiras, for the following reasons:

1. Because, in my opinion, Green was the first and original discoverer of a patentable process described in the letters patent issued to him, and the claim in the reissue is not enlarged, and is for the same process described in the original.

2. Because, before the act of 1870, it was generally understood, and, in my opinion, correctly decided, that under sections 7 and 15 of the act of 1836, and section 7 of the act

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of 1839, a use of the invention more than two years prior to the application would not defeat a patent unless the use was had with the consent and allowance of the inventor. Such use is not proved. *Kelleher v. Darling*, 3 Ban. & A. 449; *Draper v. Wattles*, id. 618; *Henry v. Prov. Tool Co.* id. 513. See *Hall v. Macneale*, 23 O. G. 939; *S. C.* 2 Sup. Ct. Rep. 79.

3 Because the Milwaukee wells testified to by "Purdy" were artesian wells, and Green's process was not used. The tubing described made a reservoir, and a lead pipe attached to a pump was dropped into it and the water drawn through the lead pipe.

4. Because prior use should be clearly established, and where the evidence is contradictory mere preponderance is not sufficient and satisfactory; "to doubt upon this point is to resolve it in the negative." The proof of prior use at Independence, Iowa, leaves room for a fair and reasonable doubt when weighed with care and scrutiny. 4 Fisher, Pat. Cas. 468-482, 559, 560; *Coffin v. Ogden*, 18 Wall. 121; *Putnam v. Hollender*, 6 Fed. Rep. 893.

NOTE.—"The statute of 1833 (6 St. p. 117, § 6) did not allow the issue of a patent when the invention had been in public use or on sale for any period, however short, with the consent or allowance of the inventor, and the statute of 1870 (16 St. p. 201, § 24; R. S. § 4896) does not allow the issue of a patent when the invention has been in public use for more than two years prior to the application, either with or without the consent or allowance of the inventor." *Manning v. Cape Ann Isinglass and Glue Co.* 2 Sup. Ct. Rep. 838.

The exemptions of married women and infants from the operation of statutes of limitations "rest in every instance upon the express language in those statutes." *Vance v. Vance*, 2 Sup. Ct. Rep. 851.

Coburn and another v. Brainard and another.

COBURN and another v. BRAINARD and another.

(Eastern District of Missouri. March, 1883.)

1. **PATENTS — EFFECT OF DECISION AS TO VALIDITY — PRELIMINARY INJUNCTION.**— Where a motion is made for a preliminary injunction for an alleged infringement of a patent which has been held valid, without collusion, in a contested patent case, the validity of the patent is considered settled for the purposes of the motion.
2. **SAME.**— Where, however, the decision does not show what claims were held valid, nor what would be an infringement, two questions are left open, viz: (1) What are the contrivances covered by the patent? and (2) has the defendant infringed the same?

Motion for a preliminary injunction for an alleged infringement of letters patent of the United States for an "improvement in cases for transporting eggs," and an "improvement in egg-boxes."

The first of said patents contains two claims, which are as follows:

"(1) A case for transporting eggs, in which are more than two removable trays, each containing a series of bottomless cells or copartments, some of these cells having walls irrespective of the walls of the case, and each tray being separated from its adjoining tray by a removable diaphragm or dividing board; (2) the combination of more than two trays, each containing a series of bottomless cells or copartments, some of these cells having walls irrespective of the walls of the case in which the combination may be used, and each tray being separated from its adjoining tray by a removable diaphragm or dividing board."

The other patent alleged to have been infringed contains the following claims:

"(1) A tray or double series of rectangular bottomless pockets constructed of flexible material, or in separate strips, interwoven and permanently interlocked, beyond danger of separation, by means of straight slits or slots cut in opposite edges thereof, substantially as and for the purposes set forth.

Coburn and another v. Brainard and another.

(2) A tray or double series of rectangular bottomless pockets, constructed of suitable flexible material, in two intersecting series of separate strips, each series of strips being provided with slots or slits cut in opposite edges of each strip, whereby the respective series are interwoven and permanently interlocked beyond danger of separation, substantially as and for the purposes set forth. (3) A tray or double series of rectangular bottomless pockets, constructed of suitable flexible material, in two intersecting series of separate strips, each series of strips being provided with slots or slits cut alternative in opposite edges of each strip, whereby the respective series are interwoven and permanently interlocked beyond danger of separation, substantially as and for the purposes set forth."

The complainants, in their bill, allege that the defendants have acknowledged their infringement of said patents by a written agreement.

For remaining facts see *Coburn v. Clark*, 5 McCrary, 99.

Overall & Judson, for complainants.

Phillips & Stewart, for defendants.

TREAT, *District Judge*.—In case No. 2123 (*Coburn v. Clark*, 5 McCrary, 99) many suggestions have been made applicable to this case.

In addition thereto the question of arrangement between the parties, or confessions, are presented. Waiving that inquiry, and looking to the interlocking and also the combination claims, an injunction order must go provisionally against infringement of either of said claims.

Blanchard v. City of Kansas.

BLANCHARD v. CITY OF KANSAS.

(Western District of Missouri. May, 1883.)

1. CONSTITUTIONAL LAW — COMPENSATION FOR PROPERTY TAKEN FOR PUBLIC USE — CONSTITUTION OF MISSOURI OF 1875.— By the constitution of Missouri, adopted in 1875, it was evidently intended that before property could be taken for public use the amount of compensation to be made to the owner should be ascertained and paid, and when this has not been done the owner may recover its value in any proper form of action.

At law.

Before MILLER, McCARY and KREKEL, *Judges*.

MILLER, *Circuit Justice (orally)*.— In the matter of Blanchard against the city of Kansas, in which a demurrer was filed recently, we are called upon without the aid of any of the state courts, certainly without the aid of the supreme court of Missouri, to construe a clause of the constitution of the state of very considerable importance to cities generally, and especially to this city of irregular surface, where such awful grades are encountered and so much change in the natural surface has to be made, and in which the authorities have shown very commendable diligence in complying with those demands.

The view that we have taken of the case departs somewhat from the course of argument on the subject. I am of opinion that the constitution of Missouri of 1875 makes a much wider departure from the constitution of 1865 on this subject than counsel have suggested on either side. The clause which provides, or the principle which provides, that property shall not be taken for public use without just compensation is one which existed at the common law. It has been considered one of the laws originating in natural right, — a *jus gentium*,—and has been embodied in the constitution of the United States, and probably in some form in the constitution of every state in the Union. It has in

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the states of the Union assumed various forms of expression, and in regard to the particular form of expression the states differ a good deal. While the ordinary form and the form that is found in the constitution of the United States is a declaration that private property shall not be taken for public use without just compensation, there are many of the states which add, "without compensation first paid or secured." The constitution of Missouri of 1865 adopted the more general form of expression, and did not require compensation to be first paid or secured. And I presume a majority of the constitutions of the states, like that of the United States, do not require the compensation to be paid before the property is taken.

One reason for that is that it is the exercise of the power, as it is called, of eminent domain, which can only be exercised by the authority of the government itself, state or national. And as it is supposed that each government which exercises that authority is responsible and will always pay the just damages, or when it confers it upon any other corporation, as upon a city, that the city is responsible and will always pay the just damages, it was not thought advisable, in a great many of these constitutions, to insert any provision about previous payment. But after a while, when this power was conferred on railroad companies and other corporations to exercise the power of eminent domain, it became the policy of some of the states that the money should be paid in advance or secured.

I have not found copies of all the constitutions here. In fact, in the time I have had to look up the subject, I have not found a copy of any constitution, except the last constitution of Missouri, which makes that provision. But I know very well from my reading that there are many constitutions which require that the money shall be paid or secured in advance. With these remarks I will proceed to compare the two constitutions of Missouri — the one of 1865 and the one of 1875.

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The provision in the earlier constitution of Missouri is one taken from the old-fashioned bill of rights, I think, probably, of Massachusetts. The language is "that no property ought to be taken or applied to public use without just compensation;" and there it ended, leaving the legislature to make proper provisions on the subject.

Now, it seems that when the constitutional convention of 1875 came to that subject, they made material changes—two material changes, which are equally obvious, and both of which are important. And one of these was that they provided that the compensation should be first paid, and I take it that was the most important change in the provision in the new constitution, which reads as follows: "That private property shall not be taken or damaged for public use without just compensation." If we leave out the words "or damaged," and read it, you will see that "private property shall not be taken for public use without just compensation." That is about the same as the old one.

"Such compensation shall be ascertained by a jury or board of commissioners of not less than three freeholders, in such manner as may be prescribed by law, and until the same shall be paid to the owner, or into court for the owner, the property shall not be disturbed, or the proprietary rights of the owner therein divested." Leaving out the words "or damaged," then, it is perfectly obvious that the main purpose of that law was that when private property should be taken for public use the money should be first paid, which was not the constitutional provision before. It provided a means by which it might be ascertained; and that ascertainment was by a jury, or board of commissioners, of not less than three freeholders, "in such manner as may be prescribed by law." Whether those words "may be prescribed by law" mean some future law to be enacted upon the subject, or refer to some law already in existence, it is simply a declaration that it shall be ascertained by a board of commissioners, or by a jury, according to law.

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I do not enter into the question of whether further legislation is necessary on this subject to provide means of ascertaining these damages, because in the present case neither party has appealed to any such law, or acted upon any such grounds. I take it that the provision in the constitution for compensation, and the mode of ascertaining it, does not — as counsel seem to imagine — refer simply to the compensation for injury to the property damaged, and the mode of ascertaining it, but it applies equally under this constitution to the value of the property taken and to the injuries inflicted on the property damaged.

In both cases compensation should be first made, and it must be ascertained by the mode pointed out in this constitution. In the case before us the property is injured; the property is taken, if you use that phrase; the damages were not ascertained; the damages were not paid into court; the damages were not paid to the party; no agreement was made with the party; but the city went on, as I understand the complaint, to do the work and inflict the damage, and has never taken any steps under any law, natural or divine, constitutional or unconstitutional, to make compensation. It results, then, that since the positive declaration of the constitution is, that private property shall not be taken or damaged for public use without just compensation, that it is bound in some way to make that just compensation, and that the law shall compel it to do it.

And we are all of opinion that the second clause in that constitutional provision,— there being three in that section,— that the second clause relates to the ascertainment of damages in order that it may be paid in advance. It imposes no rule of measuring the damages when it is not paid at all, and when the damages are inflicted and no proceedings are instituted to ascertain them. It follows from our view, however, since neither party has taken advantage of that provision or sought to put it in force, and the city exercised the right which the constitution and the law gave it, to cut

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down the streets and injure that property, it is responsible, and the other party has also the right that the law gave her to recover these damages in any proper form of action.

The result is that the demurrer in this case is overruled.

McCREARY and KREKEL, JJ., concur.

FORDYCE, Assignee, etc., v. PEPER. (On Bill.)
 PEPER and others v. FORDYCE, Assignee, etc. (On Cross-bill.)

(*Eastern District of Arkansas. April, 1883.*)

1. **FACTOR—RIGHT OF SALE FOR ADVANCES.**—A factor who has made advances on the credit of the goods consigned to him for sale has a right to sell enough to reimburse his advances, unless restrained by some agreement with his consignor.
2. **SAME—AGREEMENT TO HOLD FOR CERTAIN TIME.**—If a cotton factor for a sufficient consideration agrees to hold the cotton of a consignor until the opening of the market the next year, he is bound to do so; and if he sells the cotton before that time without the consent of the consignor, he is liable for the difference between the price at the time he sold and the price at the time he was authorized to sell.
3. **SAME—FRAUD OR GROSS NEGLIGENCE OF.**—A factor or other agent, who is guilty of fraud or gross negligence in the conduct of his principal's business, forfeits all claim to commission or other compensation for his services.
4. **SAME—FALSE ACCOUNT OF SALES.**—Where a factor knowingly transmits to his consignor a grossly false and fraudulent account of sales, and does not enter the sales on his books until months after they were made, and then enters them falsely, no credit will be given to the factor or his books.

In equity.

CALDWELL, *District Judge*.—In 1880, and for some years prior thereto, W. A. Moore carried on business as a merchant

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at Hot Springs. In its season, he handled cotton, which he consigned for sale to factors in St. Louis and elsewhere. The defendant Peper was a cotton factor, doing business in St. Louis, and in the fall of 1880 he opened negotiations with Moore for the consignment of the latter's cotton for that year. The parties arrived at an agreement on the subject, as to the terms of which they now differ widely. During the cotton season Peper advanced to Moore large sums of money, and the latter shipped to the former nine hundred and twenty-nine bales of cotton and other articles. On the tenth day of January, 1881, Moore executed to Peper & Co. three notes, each for \$2,433.46, drawing ten per cent. interest from date, and due in ninety days, and six and nine months, respectively; and on the same day executed deeds of trust on real property to secure their payment. These notes and one dated January 13, 1881, for \$100, and the deeds of trust to secure them, do not represent any transaction or debt separate and distinct from the advances charged to Moore in the account current. They were taken to secure advances made and to be made, and were to stand as a security for any balance due from Moore to Peper on final adjustment of their accounts. On the sixteenth of May, 1881, Moore failed, and made an assignment of his property to the plaintiff Fordyce for the benefit of his creditors. As soon as Peper was advised of Moore's failure, he directed a foreclosure of the deeds of trust, and the trustee named in the deeds advertised the property for sale on the fourteenth of June, 1882. Thereupon, the plaintiff Fordyce filed the bill in this case for an injunction and accounting, alleging in substance that upon a fair and honest adjustment of the accounts between Moore and Peper, according to the terms of the contract between them, there would be nothing due the latter, but a large sum due Moore, and charging Peper with various frauds in the conduct of the business. Peper filed an answer, denying the allegations of the bill; and a cross-bill, praying for a foreclosure of the trust deeds.

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The first cotton shipped by Moore to Peper, amounting to sixty-seven bales, was sold in December, 1880, and an account of sales rendered, to which no exception is taken. The contention relates to the remaining eight hundred and sixty-two bales. In July, 1881, Peper transmitted to the assignee of Moore an account of sales, showing that eight hundred and fifty-eight bales had been sold on the sixteenth day of June, at nine and one-eighth cents a pound. This account of sales is conclusively shown to be grossly fraudulent. It is proven — indeed, Peper and his clerk are compelled to admit the fact — that instead of eight hundred and fifty-eight bales having been sold on the sixteenth of June for nine and one-eighth cents per pound, two hundred and fifty-eight bales of that number had in fact been sold on the fourteenth of February for eleven and one-eighth cents per pound. No entry of the sale of the two hundred and fifty-eight bales on the fourteenth of February was ever made in Peper's books, and no account of the sale was rendered. On the contrary, Peper wrote Moore, after the sale, that he was holding all his cotton, and when he sold the remaining six hundred bales on the sixteenth of June, at nine and one-eighth cents a pound, he transmitted an account of sales showing the sales of the whole eight hundred and fifty-eight bales on that day, and at the prices of that day, charging Moore insurance and storage on the whole eight hundred and fifty-eight bales down to that date. The two hundred and fifty-eight bales had been sold and delivered on the fourteenth of February, and Peper had received the money for it at the rate of eleven and one-eighth cents per pound; but no credit was given to Moore, and he was charged with interest on all advances made to him for the period from the fourteenth of February to the sixteenth of June, as though none of his cotton had been sold. This was not an oversight or mistake. It was purposely and knowingly done, and was, therefore, a wilful and deliberate fraud. When Peper directed his clerk to transmit an ac-

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count of sales showing the sale of all the cotton on the sixteenth of June at the prices of that day, the latter called his attention to the fact that two hundred and fifty-eight bales of the cotton had been sold four months before for two cents a pound more than was realized for that sold on the sixteenth of June, to which Peper responded he had "a *carte blanche* to sell it." Neither Peper nor his clerk are able to invent a plausible pretext or excuse for this fraud. The difference in the price of cotton at the time the two hundred and fifty-eight bales were sold and the time it was reported sold, and storage and insurance, and interest on the proceeds of the sale for the like period, amounts to nearly \$2,000.

It is shown that no entry relating to the sale of the eight hundred and fifty-eight bales of cotton appears on the defendant's books prior to July. These facts utterly discredit Peper and his books. The preponderance of evidence establishes the fact that Peper agreed, in consideration that Moore would ship him his cotton and execute the deeds of trust to secure advances, to hold the cotton until the full opening of the cotton market in the fall of 1881, unless Moore should order it sold before that time. Having agreed with Moore upon sufficient consideration to hold the cotton, he was bound to do so. It is undoubtedly the law that a factor who has made advances on the credit of the goods has a right to sell enough to reimburse his advances unless restrained by some agreement with his consignor. *Weed v. Adams*, 37 Conn. 378; *Feild v. Farrington*, 10 Wall. 141. Peper was restrained by the terms of his contract with Moore from selling the cotton before the opening of the cotton market in the fall of 1881. Moore is entitled to the benefit of this contract. Neither Moore nor Fordyce, his assignee, ratified this sale, but protested against it, and have continued to protest. Peper must account to the plaintiff for the difference in the price of cotton at the time it was sold and the price in the fall of 1881.

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There is also a wide discrepancy in the accounts of the respective parties growing out of differences in weights, grade and condition of the cotton. The clear weight of the evidence is with the plaintiff on all these points. The difference between the parties aggregates a large sum. Moore claims and testifies that Peper owes him \$6,760, and Peper claims and testifies that Moore owes him \$10,000. The accounts and claims on both sides have been carefully examined in the light of the evidence and the law. It would serve no useful purpose to enter into a detailed statement of the accounts and point out each item of difference. The true state of the accounts between the parties, upon the facts as found and the law, is shown in the statements and exhibits appearing in and attached to the deposition of the accountant, Mr. Convers. This witness is disinterested, and is an honest and competent accountant and book-keeper. He had access to the books and papers of both parties, and his statement of the accounts is based on facts clearly established by the evidence. From these statements it appears that if the defendant had complied with his contract, and held the cotton until the opening of the market in 1881, and sold then and accounted for the proceeds according to the actual weight, grade and condition of the cotton, there would have been nothing due him from Moore, but a small sum due to the latter. The only point of difference between the parties which is left in doubt by the evidence relates to the rate of interest Moore was to pay. He claims he was to pay only eight per cent., while Peper claims he was to pay ten. The fact that the notes draw ten per cent. is a strong circumstance to show that from their date, at least, balances were to draw that rate. In the statements of Mr. Convers, interest is calculated at eight per cent.; but if the additional two per cent. be allowed the defendant, it is more than overcome by an error made in allowing commissions to the defendant in the statement of

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the accounts. The defendant charges \$966.90 for commissions, and this item is allowed to him in Mr. Convers' statement of the accounts.

It is a settled rule of law that a factor or other agent who is guilty of fraud or gross negligence in the conduct of his principal's business forfeits all claim to commissions or other compensation for his services. Story, Ag. §§ 333, 334; 1 Pars. Cont. 99; *Segar v. Parrish*, 20 Grat. 672; *Vennum v. Gregory*, 21 Iowa, 326; *White v. Chapman*, 1 Starkie, 113; *Hammond v. Holiday*, 1 Car. & P. 384; *Denew v. Duverell*, 3 Camp. 451; *Hurst v. Holding*, 3 Taunt. 32; *Hill v. Featherstonough*, 7 Bing. 569; *Turner v. Robinsons*, 6 Car. & P. 16; *Smith v. Crews*, 2 Mo. App. 269; *Brannum v. Strauss*, 75 Ill. 234. In this case the defendant deliberately returned a grossly fraudulent account of sales, kept false books, and sold plaintiff's cotton in violation of his contract. These frauds and misconduct made it necessary for the plaintiff to resort to a court of equity for an accounting. On these facts, the defendant is not entitled to commissions or other compensation for his services.

Allowing the defendant interest at the rate of ten per cent., and deducting his commissions, the balance is still in favor of the plaintiff. But the plaintiff is not entitled to a decree for this balance, because it about equals the amount of the small notes received by the defendant as collateral, and which are charged to him in the statement of the accounts, but which have not been collected. These notes, being six of W. H. Groves for \$50 each, and one of Bill for \$32.48, may be retained by the defendant. It is therefore decreed that the original bill be perpetually enjoining the defendants from foreclosing by sale by trustee or otherwise, the deeds of trust mentioned in the bill, and requiring the defendants to surrender said deeds and the notes of the plaintiff Moore for cancellation, and dismissing the cross bill of Peper for want of equity, and requiring him to pay all costs.

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E. W. Kimball and G. W. Murphy, for complainants.

W. G. Whipple and G. H. Latta, for defendants.

NOTE.¹—A factor has implied authority to sell in his own name. *Baring v. Corrie*, 2 Barn. & Ald. 187; *Graham v. Duckwall*, 8 Bush, 12. A general consignment to a factor imports an authority to sell according to the usages of trade. But the consignor may at the time of the shipment or afterwards, if before the sale, impose terms as to time and price, to which the factor must conform; and if he disobeys such instructions, he will be liable for any damages resulting from his disobedience. *Evans v. Root*, 7 N. Y. 186; *Courcier v. Ritter*, 4 Wash. C. C. 549; *Bell v. Palmer*, 6 Cow. 128; *Scott v. Rogers*, 81 N. Y. 676; *Marfield v. Goodhue*, 8 N. Y. 62; *Blot v. Boiceau*, 8 N. Y. 78; *Cotton v. Hiller*, 52 Miss. 7; *Van Alan v. Vanderpool*, 6 Johns. 70; *Goodenow v. Tyler*, 7 Mass. 36.

Unless restrained by instructions, a factor who has made advances may sell so much as is necessary to reimburse himself without special instructions. *Blackmar v. Thomas*, 23 N. Y. 67; *Brown v. McGran*, 14 Pet. 479. His right to sell may, however, as in the principal case, be controlled by a special agreement fixing the time or price; and in such case he may not sell even to reimburse himself for advances, except in accordance with such agreement. *Smart v. Sanders*, 3 Man. Gr. & Sc. 380; *Milliken v. Dehon*, 27 N. Y. 364. See, also, *Raleigh v. Atkinson*, 6 M. & W. 670; *Brown v. McGran*, *supra*; *Frothingham v. Evertson*, 12 N. H. 239.

The right of the owner to impose terms as to time or price is restricted, if he has drawn against the consignment before the instructions are given; and he cannot in that case control the factor as to time of sale or price, unless he pays the factor his advances made or liabilities incurred. The factor has by such advances or liabilities acquired a special property, and may sell so much as will reimburse him. *Cotton v. Hiller*, *supra*; *Weed v. Adams*, 87 Conn. 378; *Brown v. McGran*, 14 Pet. 479; *Mooney v. Mueser*, 45 Ind. 115. The factor should not, however, sell below the price named in his instructions, even where he has made advances, *Marfield v. Goodhue*, 8 N. Y. 62; *Blot v. Boiceau*, 8 N. Y. 78; *Frothingham v. Evertson*, 12 N. H. 239. The factor may also sell, even contrary to instructions, when the consignor fails to keep up the margin over advances and *Hendry v. Fielding*, 10 Heisk. 367; *Moeller v. McDougall*, 36 Ill. 310; *Kraft v. Fancher*, 41 Mo. 304. So, when the goods upon which advances have been made, if sold when the orders were given, would not bring the

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sums advanced, or where such sale would otherwise prejudice the factor. *Blair v. Childs*, 10 Heisk. 199; *Howland v. Davis*, 40 Mich. 515.

The right of the factor to sell is limited to the protection of his own interest in property; and, if he sells more than is necessary for that purpose, contrary to the orders of his principal, he is liable for the loss incurred. *Weed v. Adams*, *supra*.

The rule that an agent is entitled to his commissions only upon a due and faithful discharge of all the duties of his agency in regard to his principal, and therefore that if he is guilty of gross negligence, gross misconduct, or gross unskillfulness in the management of his agency, he will forfeit his right to commissions, is well settled. *Story*, Ag. §§ 381, 382; *Sea v. Carpenter*, 16 Ohio, 412; *Dodge v. Tileston*, 12 Pick. 328; *Fisher v. Dynes*, 62 Ind. 348. Among the duties above referred to is that of keeping regular accounts; and an agent who fails to account, or who renders false and fraudulent accounts, ought, as it seems, to forfeit his commissions; and so the doctrine is usually stated. See *Evans*, Ag. *250; *Story*, Ag. § 382; *Willard*, Eq. Jur. *104; *Smith v. Crews*, 2 Mo. App. 269, and the cases cited in the principal case. See, however, *Sampson v. Somerset Iron Works*, 6 Gray, 120; *Beall v. January*, 62 Mo. 434. Mere irregularity, however, in the account, will not suffice to work such forfeiture. If the agent can make out his claim by satisfactory evidence, he will be paid. *Evans*, Ag. *250; *Willard*, Eq. Jur. *104.

As to the decision in the principal case, it seems to the writer that there can be no question as to its entire correctness upon every point stated; and the case, as a whole, is a happy illustration of that entire harmony which ought always to exist between law and justice.

M. D. EWELL.

Chicago, June 9, 1883.

 GREENWALT v. DUNCAN and others.

(*Eastern District of Missouri. June, 1883.*)

1. EQUITY — SUIT TO QUIET TITLE — CROSS-BILL — RIGHTS OF DEFENDANT.—The defendant in a suit in equity to remove a cloud from a title has a right to file a cross-bill, urging a superior title in himself; and, if his title is found to be better than the plaintiff's, he is entitled to a decree in his favor settling the whole controversy.

In equity. Demurrer to amended cross-bill.

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A demurrer having been sustained to the original cross-bill herein (see 16 Fed. Rep. 35), on the ground that it did not contain adequate averments to show title in the defendants, an amended cross-bill was filed in which the proper averments were made. Thereupon the plaintiff demurred to the amended cross-bill on the following grounds, viz.:

"*First.* It does not appear from said bill, or from any fact therein stated, that the complainant, or any person to her use or in her behalf, is now, or ever was, in possession of the land or premises in question, or of any part thereof. *Second.* Said bill, in case the same were true, contains no matters of equity whereon this court can ground any decree, or give complainant any relief, as against these defendants."

E. R. Cunningham, Jr., for complainant.

E. R. Monk, for defendant.

TREAT, *District Judge*.—This court has, in this case, expressed heretofore its views as to the proper practice to be pursued, and stated the grounds on which alone it has jurisdiction in equity. The defendant is brought into court for the purpose of having a cloud upon title removed. The defendant appears and asks to settle the controversy, whereby, if the plaintiff has not the title, she may have a decree in her favor, thus avoiding multiplicity of suits. The question is, obviously, as to the validity of a tax title, and the pleadings, it seems, might have been briefly framed to raise what must ultimately be decisive. The pleaders have chosen a different course, involving, it may be, unnecessary costs and delay. Of that the court can know nothing. The case must be taken, so far as this demurrer is concerned, just as it stands.

The defendant, who has been brought into court to have a deed standing in her name set aside as a cloud upon plaintiff's title, has a right to have the whole controversy between her and the plaintiff determined, and, if it so happen that

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her title is the real one, and the plaintiff's invalid, to obtain a decree accordingly.

The demurrer to the amended cross-bill is overruled, and leave to next rule-day to file replication.

DAHLMAN v. JACOBS and another.

(Eastern District of Missouri. June, 1883.)

1. EQUITY — JURISDICTION — MARRIED WOMEN — SUIT BY CREDITOR AT LARGE TO SET ASIDE A MORTGAGE EXECUTED BY AN INSOLVENT DEBTOR, OR HAVE IT DECREED TO STAND AS A GENERAL ASSIGNMENT. — Where a married woman doing business in her own name became insolvent, and together with her husband executed to A., one of her creditors, an instrument purporting to be a mortgage, of all her separate property, to secure the payment of a debt she owed him, and B., another of her creditors, whose demand had not been established at law, brought suit in equity to have the instrument set aside, or decreed to stand for a general assignment for the benefit of all the creditors, *held*, that B. could maintain his bill, and that the court had jurisdiction.

In equity. Motion to vacate order sustaining a demurrer to the bill.

A demurrer to the bill in this case having been sustained, the plaintiff filed a motion to vacate the order sustaining the demurrer, upon the following grounds, viz.:

"(1) It appears by the bill that plaintiff cannot proceed at law to reduce his claim to judgment, as the debtor is a married woman; (2) it appears by the bill that the object is the assertion of a trust, the protection of a trust fund, and ratable distribution of the same; (3) it appears that the debtor is insolvent by the bill itself, and a judgment would be useless, and equity does not require that to be done which is unavailing."

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The section of the Revised Statutes of Missouri of 1879 governing the operation of assignments for the benefit of creditors is as follows:

Sec. 534. "Every voluntary assignment of lands, tenements, goods, chattels, effects and credits made by a debtor to any person in trust for his creditors shall be for the benefit of all the creditors of the assignor, in proportion to their respective claims, and every such assignment shall be proved or acknowledged, and certified and recorded, in the same manner as is prescribed by law in cases wherein real estate is conveyed."

Patrick & Frank, for complainant.

D. Goldsmith, for defendants.

TREAT, *District Judge*.—The order heretofore entered dismissing this case is vacated. From the rulings of the supreme court of Missouri in like cases a suit in equity is proper, a principal defendant being a married woman. The question presented by the demurrer to the bill would, if reviewed at length, require an elaborate analysis of the many conflicting statutes cited, and decisions thereunder, involving an attempt to reconcile diverse opinions upon the general subject. The case now before the court, however, arises under the Missouri statutes, which have been fully interpreted, not only by the Missouri supreme court, but also by the United States circuit court at Jefferson City last October. That decision is conclusive. The demurrer is overruled.

Manny v. Oyler.

MANNY v. OYLER.

SAME v. ST. LOUIS MALLEABLE IRON CO.

SAME v. FURST & BRADLEY MANUF'G CO. and another.

(Eastern District of Missouri. June, 1883.)

1. PATENTS—ROTARY COULTERS FOR PLOWS—PFEIL PATENT, NO. 4,533.—At the date of the Pfeil patent and its reissue, the mere change of form or position in a collar and spindle connected with a standard from a plow-beam, the rotary motion of which was limited by a pin through a slot at one or other foot of the collar and spindle, was not a patentable device, whether the pin was inserted at the lower end of the spindle with or without a slot, or inserted through the collar and spindle with a slot, or inserted through the spindle above or below the collar with or without lugs, or whether the pin was used to strike the arms of the coultter or not, and the Pfeil patents upon said devices are invalid for want of novelty.
2. SAME—SHERMAN PATENT, NO. 67,223—INFRINGEMENT.—The invention covered by the Sherman patent for an improvement in rolling coulters consists in a combination in which the cutting wheel is hung in a triangular frame separate from the standard, but attached thereto by means of sockets, or a socket through which the standard passes, and which from their form allow the frame to have a lateral play, while the standard is clamped fast to the plow-beam. *Held*, in a suit for an alleged infringement of said patent, that it was not infringed by a device in which the cutting blade is hung in a yoke differing from the Sherman yoke in shape, and the upper end of which is perforated so as to allow the lower end of the standard to fit into it, and also differing from the Sherman patent in being provided on the under side with a peculiar projection against which a pin at the lower end of the spindle strikes and regulates the vibration.

This is a suit to recover for the alleged infringement of patent No. 67,222, granted to J. H. Sherman, July 30, 1867, and patent No. 4,533, reissued to J. C. Pfeil, August 29, 1871, and originally granted April 7, 1863, and numbered 76,343. Both patents are for improvements in rolling coulters, and both are held by plaintiff as assignee. The Sherman letters patent state that the patentee's invention "consists in hanging the cutting-wheel or blade in a frame

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separate from the standard, but attached thereto by means of sockets, or a socket through which the standard passes, causing the cutting-wheel or blade to follow behind the standard, and, from the form of the sockets, to have a lateral play, while the standard is clamped fast to the beam of the plow or other implement; and they contain the following claims:

"(1) The frame, B, B', separated from the standard, but attached to it by means of sockets or socket, allowing a lateral play of the frame about the standard, substantially as set forth. (2) The form of sockets, C, C', filling the standard at its front edge, but sufficiently open at the back part to allow a lateral swing of the frame, substantially as and for the purposes set forth."

The original Pfeil patent contains the following claims, viz.:

"(1) The peculiar arrangement and combination of the spindle, B, on cutter-arm, A, and collar, M, with pole, B, therein, for the purpose of forming a caster-joint for cutter, E, substantially in the manner and for the purposes herein specified. (2) The slots, L, L, in the cutter-arm, A, whether said arm be for a rotary or any other kind of cutter, where said slots are used to allow of vertical adjustments of said cutter, substantially in the manner and for the purposes herein specified. (3) The pin, C, when said pin serves both to secure the collar, M, on the spindle, A, and to limit the rotary caster motion of the cutter, E, in the manner and for the purposes herein specified."

The claims in the Pfeil reissued letters patent are as follows:

"(1) The combination of the slotted spindle on the arm of the coulter, the yoke slotted to receive the spindle, and the locking-pin, limiting the vibration of the coulter,—all these members being constructed and operating as hereinbefore set forth. (2) The combination of the plow-beam, the clamping-bolts, the vertical slotted arm, its slotted spindle, the

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yoke slotted to receive the spindle, and the locking-pin,—all these members being constructed and operating in combination as hereinbefore set forth. (3) The combination of the coulter, its slotted yoke turning on a fixed spindle, and the spring-pin passing transversely through the spindle, and serving to limit the vibration of the coulter, as well as to connect the spindle and coulter,—all these members being constructed and operating in combination as hereinbefore set forth. (4) The combination, in a plow-coulter, of a vertically adjustable arm, the downward tapering spindle thereon, and the coulter-yoke, having an upwardly flaring hole or socket therein to receive the spindle,—all these members being constructed and operating, as hereinbefore set forth, to compensate wear of the spindle or socket, to secure a snug joint, and to prevent the wobbling of the coulter-yoke upon the spindle. (5) The combination of the tapering spindle of the coulter-arm with the spring locking-pin passing transversely through it parallel with the face of the arm,—these members being constructed and operating as hereinbefore set forth.”

The defendant's coulter is substantially the same as the one attempted to be covered by the Pfeil patents.

Taylor & Pollard, for complainant.

West & Bond, for defendants.

TREAT, *District Judge*.—It is not the purpose of the court to give a detailed analysis of the testimony, or of the various patents submitted. It may be that all claimed by the plaintiff under the Sherman and Pfeil patents, essential to the issues now under consideration, can have no force, because both of said patents were anticipated or not infringed. Whether this be correct or not, it is evident that so far as the Sherman patent is concerned the defendants do not infringe the same. The mode of attaching and limiting the

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vibration of the coulter is essentially different; and if not, it is apparent that the device therefor was well known before Sherman obtained his patent, unless his peculiar frame and yoke at the end of the standard constituted his invention. If his invention rests solely on his frame and yoke in combination, then the defendants do not infringe.

A close research into the state of the art at the date of the Pfeil patent and its reissue shows a very narrow limit for invention. The many contrivances patented and well known, whereby coulters could be attached to plow-beams, and adjusted vertically to single or gang-plows, and limited in vibrations or lateral motion, establish definitely that there was no novelty in Pfeil's patent, within the meaning of the patent laws of the United States. The mere change of form or position in a collar and spindle connected with a standard from a plow-beam, the rotary motion of which is limited by a pin through a slot at one or the other top of the collar and spindle, was not a patentable device. Whether a pin is inserted at the lower end of a spindle, with or without a slot, or is inserted through the collar *and* spindle with a slot, or is inserted through the spindle above or below the collar, with or without lugs; or whether, as Pfeil originally claimed, the length of the pin is used to strike the arms of the coulter,— they are the same, substantially, and had been suggested by others, and were well known to the art.

The court can discover nothing patentable in the Pfeil patents, and no infringement of the Sherman patents. Decree dismissing the bill, with costs, respectively.

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WASHBURN & MOEN MANUF'G CO. and ELWOOD v. FUCHS.

SAME v. SIMMONS HARDWARE Co. and others.

SAME v. GATES.

SAME v. SIMMONS HARDWARE Co. and others.

SAME v. GATES.

(Eastern District of Missouri. June, 1883.)

1. PATENTS — REISSUE MUST NOT BE BROADER THAN THE ORIGINAL. — The reissue of a combination patent must be confined to the original combination, and cannot be expanded to make a new combination by the introduction therein of devices not included in or suggested by the original.
2. SAME — BARBED-WIRE FENCE — KELLY REISSUE — INFRINGEMENT. — The original Kelly patent on barbed-wire fences, numbered 74,879, and issued February 11, 1868, was for a combination by which a plate of iron or steel was strung on a wire and fastened by a blow or compression so as to flatten the opening and fasten it to the wire. The patent contained the following clause, viz.: "I can, where it is desirable to increase the strength of the wire, lay another wire of the same or different size along-side of a thorn wire, and can twist the two by any suitable mechanism. Figure 2 is referred to. It tends to insure a regularity in the distribution of the points in many different directions." The reissue of the same patent, No. 6,902, granted February 8, 1876, suggests in its specifications that the twisted wire will lock the thorns and insure a regularity in the distribution thereof. Prior to the Kelly reissue other constructions of barbs, and their connection with a second and twisting wire to lock barbs of different construction, had been patented or applied for. *Held*, in a suit to recover against alleged infringers who manufactured a fence in which the barb is of wire coiled around one of the strands of the fencing, and locked in position by a second wire twisting around the first: (1) That the wire fence manufactured by defendants neither infringed the original nor the reissued Kelly patent; (2) that the Kelly reissued patent was void because for a combination not included in or suggested by the original, and because, if there had been inadvertence, etc., on his part, he had forfeited his right to have his mistake corrected by his laches.
3. SAME — GLIDDON REISSUE. — The original Gliddon patent, No. 150,683, on wire fences, was for a combination of two wires not twisted, but looped by spurs at intervals, connected with a slotted tube and springs to regulate expansion. In the reissue No. 6,913 the looping of the wires, the use of the spurs with respect thereto, the slotted

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tube and spring disappear, and the close twisting of two wires, with spurs interjecting at stated intervals, and locked in position by the second or twisting wire, is claimed. *Held*, that the reissue is void because for a new combination.

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WASHBURN & MOEN MANUFACTURING CO. AND ISAAC L. ELWOOD v. HENRY FUCHS. No. 2,081. This case rests on the validity of the Gliddon reissued patent, No. 6,913, and alleged infringement thereof by the defendant.

WASHBURN & MOEN MANUFACTURING CO. (sole plaintiff) v. SIMMONS HARDWARE CO. ET AL. No. 2,100. This suit is for an alleged infringement of the Kelly reissued patent, No. 6,902, February 8, 1876.

WASHBURN & MOEN MANUFACTURING CO. v. JOHN W. GATES. No. 2,104. This depends on the Kelly reissue.

WASHBURN & MOEN MANUFACTURING CO. AND ISAAC L. ELWOOD v. SIMMONS HARDWARE CO. ET AL. No. 2,106. The Gliddon patents are alone involved.

WASHBURN & MOEN MANUFACTURING CO. AND ISAAC L. ELWOOD v. JOHN W. GATES. No. 2,112. The Gliddon patents alone are before the court.

B. F. Thurston, Thomas H. Dodge, Coburn & Thacher, Offield & Fowle, John C. Dewey and Henry Hitchcock, for complainants.

J. M. Holmes, Walker & Walker and Dyer, Lee & Ellis, for defendants.

TREAT, *District Judge*.—It will be seen, from the foregoing enumeration and statement of causes, that the points are not the same in all respects in each case. Some involve solely the validity of the Kelly patents, and some the Gliddon patents, with the alleged infringements, respectively, as to each of said patents. Inasmuch as the Washburn & Moen Manufacturing Company is the sole assignee of the

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Kelly patents, and said company, together with Elwood, is assignee of the Gliddon patents, the cases have to vary accordingly. It seems from the report (4 Fed. Rep. 900) that many elements of the cases now to be considered underwent elaborate consideration before that United States circuit court. The different relationship of the plaintiffs, as assignees, has caused the diversity of suits. The general propositions controlling all of these suits may properly be considered without detailing further the specific differences between them; for if the conclusions reached are correct, they cover all the pending motions. The arguments were, by desire of the court and of all the parties, extended far beyond what is usual on motions of this kind. They went into a full consideration of the validity of the various reissues and the questions of infringement.

Acting upon the suggestions of counsel, and being fairly advised of the main points at issue, this court does what it is seldom willing to do, viz., express somewhat *in extenso* what ordinarily would be reserved for final hearing. This is the more cheerfully done, because like motions are pending in other courts of this circuit, and uniformity of decision should be had.

It has been deemed proper, in the interest of all concerned, that there should be the fullest interchange of views among the judges in this circuit before whom like motions are pending, so that the views here expressed might not be in conflict with those of other courts in this circuit, but that these might be presented as test cases.

The Hunt and Smith patents were commented upon in the case against *Huish*, 4 Fed. Rep. 900. The use by Hunt of a pointed sheet, with a hole punched therein, to be strung on a wire or rope, and by Smith, of a bend or curve in the wire to prevent the slipping of the pointed sheet or barb, is outside of the questions now presented, except to the extent that they show the state of the art when Kelly's original patent was granted. It is clear that Hunt contemplated only the

stringing on wires or ropes of his pointed sheet barbs, punched in the center, as stated. Such punched sheets could not retain, distributively, their position along the wires or ropes. Hence Smith suggested the bending of the wires at stated intervals, so that the sheet barbs might be thus distributed. Such was actually the state of the art when Kelly conceived the plan of hammering or compressing the sheet barb on the fence wire so that the same could not slip, thus making rigidly a barbed wire of barbed sheets fastened to the fence wire, before or after the fence wire was strung in place. There was a common thought, viz., the use of such punched sheets, strung along a rope or wire. Next, by Smith, a mode of keeping such barbed sheets in position; and then the compressing mode by Kelly.

In the light of these suggestions the court is brought to a consideration of the Kelly and Gliddon patents, and of their respective issues. It has been deemed advisable, instead of giving a separate opinion in each of the cases, some depending on one and some on another reissue, to treat at the same time all the patents involved, for the conclusions reached affect all alike.

The Kelly patent, No. 74,379, dated February 11, 1868, was for a combination by which a plate of iron or steel was strung on a wire and fastened by a blow or compression so as to flatten the opening and fasten it to the wire. Said plate had sharp thorns or points. It was stated that the wire might be put up with the thorns previously attached and secured, or put on loosely, and distributed and secured after the fence was erected. The former — that is, fastening of the barbs to the wire before the fence was erected — was stated to be preferred.

This clause appears in the specification:

"I can, where it is desirable *to increase the strength of the wire*, lay another wire of the same or different size alongside of a thorn wire, and can twist the two together by any suitable mechanism. Figure 2 is referred to. It tends to

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insure a regularity in the distribution of the points in many different directions."

The Kelly reissue, No. 6,902, dated February 8, 1876, contains claims, the first and fourth of which are alone involved in this suit. To ascertain their effect, reference must be made to the specifications in the reissue. Its specifications suggest that the twisted wire will lock the thorn and insure a regularity in the distribution thereof.

The original patent suggested only the twisting of the second wire to *strengthen* the first wire on which the pointed plates were strung and made rigid by compression. It is obvious that the combination in the original patent did not include any other than the thorn plates, and the mode of fastening them in the way stated, without reference to any use of the twisted wire with respect thereto. Under the reissue the first claim is substantially the same as in the original patent, which the defendant has not infringed. The fourth claim of the reissued patent is for twisting two wires and a series of thorns strung upon one of the wires and held in position by them as set forth; that is, by compression. The original patent for the fixed barbed plates, made by hammering or otherwise, did not contemplate defendant's form of barb or the use of a twisted wire to keep barbs in position. If, therefore, the reissued patent 6,902 is to be considered as covering more than the mode of fastening the plate barbs to the wire in the combination stated, and as extending the use of the twisted wire so as to include its use for the distribution and locking of all kinds of barbs, then said reissued patent is invalid as to said extension, because it was not included within the scope of the original invention, and also because, if there were any inadvertence, etc., the patentee, under the recent decisions of the supreme court, was too late in correcting the alleged mistake, etc. The result is that said reissued patent is invalid, so far as the same may be supposed to cover the use of a twisted wire to *lock and keep barbs in position*. Also, that the defend-

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ant's product, both as to the barb and the mode of fastening or distributing the same, is entirely outside of the Kelly patent or its reissue.

In the original Kelly patent, the specifications of which are above quoted, there is nothing to indicate the use of a second wire, *twisted, for locking purposes*. The means of keeping the plate or barb in position was entirely distinct from the strengthening of the fence wire by twisting around it a second wire. Prior to the Kelly reissue, February 8, 1876, other constructions of barbs, and their connection with a second and twisted wire to lock barbs of different construction, had been patented or applied for. Hence the attempt in the Kelly reissue to broaden the original patent, to cover what was not included in, or suggested by, said original patent, more especially in the light of subsequent inventions and of his laches, renders the reissue invalid. His reissue was subsequent to the Gliddon patents. True, in the specification of his reissue, he says: "Where it is desirable to increase the strength of the wire, I lay another wire of the same or different size along-side of a thorn wire, and twist the two together by any suitable mechanism." This construction is represented in figure 2. "It *locks* the thorn, and also tends to insure a regularity in the distribution of the points in many directions." It will thus be seen that the purpose of the second twisted wire was suggested in the reissued patent to have a purpose not hinted at in the original. Indeed, if the barb plate was rigidly attached to the fence wire, which was the main object of the original invention, the second wire could accomplish no other purpose, as stated, than to *strengthen* the first wire, for the barb plate was already, by the contrivance named, rigidly fixed.

In the original patent, the second claim was for "the thorns, E, and wire, D, combined in the manner represented and adapted for use in a fence herein set forth." That was for a combination of the thorns and wire; the thorns having been, by compression, fixed to the wire either before or after

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the wires were strung on the fence, the second wire performing no other function than *strengthening* the first wire. There was no *locking* suggested, nor, mechanically, could it be otherwise than useless for locking purposes, inasmuch as the locking purposes had been provided for by compression.

It is contended that the first and fourth claims of the Kelly reissue are not only for the same invention covered by the original patent, but practically cover *any* use of a second or twisting wire by which the barb plates or series of thorns can be held in position, distributively, along fence wires, whether the thorns are perforated plates or short twisted wires in loops. The *first* claim of the Kelly reissue is in these words: "I claim the combination substantially as described of the fence wire, D, and a series of thorns, E, *rigidly* fixed thereto, for the purpose herein set forth;" that is the same combination mentioned in the original patent as already described. The *fourth* is in these words: "I claim the combination substantially as described of two wires, D, D, twisted together, and a series of thorns, E, strung upon one of said wires and held in position by them, as and for the purposes set forth."

It is evident that if the use of the second wire was to *lock* the thorn without the compression of the barb plate, then an entirely new device had been inserted into the old combination. It can hardly be contended that the combination of either the original or reissued patent covered all possible forms of barbed plates, or barbs, or points which might be used in any combination irrespective of compression where twisted wires were to be used. Hence the result of this examination is: *First*, the reissued patent is expanded, unlawfully, to cover what was not a part of the original invention or combination; *second*, that inasmuch as the use of the second or twisted wire for *locking* purposes, without compression or perforated barbed plates, had in the meantime been patented or applied for; and inasmuch as

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there was no inadvertence, accident or mistake to be corrected, it is obvious that the reissued Kelly patent is invalid because not only of the laches of the patentee, but also because it is broader than the original invention. It evidently was intended to cover subsequent inventions, and by expansion appropriate the inventions of others, thus coming within the denunciation by the supreme court as to reissued patents so broadened.

The next patent under consideration is reissue No. 6,913, February 8, 1876, being a reissue of patent No. 150,683, May 12, 1874.

The claim in the original patent is in these words: "The combination of the wire, B, C, slotted tube, G, coil spring, L, and post, K, for keeping the wires in proper tension in various temperatures, as described and shown." The combination was for wires extended longitudinally, clasped at intervals by spurs, leaving the wires intermediately in an elliptical form, whereby said spurs would be retained in position, and said wires, passing through the slotted tube with its coil spring, would be kept in proper tension as the temperature varied. Of course, the clasping by said spurs was not designed to be so rigid as to prevent the operation of the slotted tube from permitting expansion and contraction.

Neither the specifications and drawings, nor "claim," are for the mode of *interlocking* barbs or spurs by means of a twisted wire. The original patent was for an entirely different mode of using spurs, and was for regulating the expansion and contraction of the wires,—a combination complicated in its character, and requiring a slotted tube and springs as described in it. There was nothing either in the drawings or specifications to indicate what is claimed in the reissue thereof. As to the reissue of February 8, 1876, No. 6,913, it is impossible to read it without observing that it was broadly expanded to cover what was not even hinted at, or in anywise suggested, in the specifications of the original patent, or in the claim therefor.

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The claim in the reissue is: "In combination with a fence wire, a barb formed of a short piece of pointed wire, secured in place upon the fence wire by coiling between its ends, forming two projecting points substantially as specified." Thus an original combination of two wires, not twisted, but looped by spurs at intervals, connected with a slotted tube and springs to regulate expansion, is, by the reissue, sought to be converted into another or new combination, whereby the looping of the wires, the use of the spurs with respect thereto, the slotted tube and spring disappear, and an entirely new combination is presented, namely, the *close* twisting of two wires, with spurs interjecting at stated intervals and locked in position by the second or twisting wire. A new position and use of the wires are thus presented, a new arrangement of the spur or barb in connection therewith, and the absence of the slotted tube or spring. The purpose of providing for expansion disappears.

The views thus expressed receive special cogency from the fact that on November 21, 1874, Gliddon obtained patent 157,124 for an invention, the claim of which is in these words: "A twisted fence wire, having the transverse spur-wire, D, bent at its middle portion about one of the wire strands, *a*, of said fence wire, and clamped in position and place by the other wire strand, *z*, twisted upon its fellow substantially as specified."

It is contended that the prior patent of May 12th contained the invention of this latter patent. If so, why did Gliddon take a second patent for what was already embraced in his former patent? Did not the taking of the latter patent necessarily imply that he had no prior patent therefor—that the two inventions were wholly different?

It is contended that as the application for the later patent was made prior to the application for and issue of the earlier patent, and that as by the rules of the patent-office a re-issue, if desired, had to be made for the patent first granted,

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therefore the patentee is entitled to go back to his first application and thus eke out his claim for a reissue, as if both patents were combined in one. Great stress has been laid on this point. It is obvious that the Gliddon reissue 6,913, of itself, was altogether too broad to be sustained, unless it is permissible to go behind the original patent of May 12, 1874, and help out the same by reference to an application under which a later patent was issued. This court is not prepared to accede to any such view of the law, whereby several patents can be combined into one for the purpose of enabling a patentee to secure a reissue of a specified patent for an invention not contained in the original. It appears to the court that the reissued Gliddon patent was for an entirely different invention than that claimed in his original patent. It also appears that he was fully aware of that fact, because he received the later patent of November 24, 1874, and now claims to expand his prior patent of May 12th to cover his later patent. It would seem there was no "inadvertence, accident, or mistake" in the patent of May 12th, entitling him to the reissue—another and an entirely distinct and patented invention.

The conclusion is that both reissued patents are void.

The attempt to justify the reissued patent of May 12, 1874, by invoking the prior application, October 27, 1873, for the patent of November, 1874, falls within the reasoning of the United States supreme court, 11 Wall. 516; the statement wherein is the *converse* of that now under review. That court said:

"Where the thing patented is an entirety, consisting of a single device or combination of old elements incapable of division or separate use, the respondent cannot escape the charge of infringement by alleging or proving that a part of the entire thing is found in one prior patent or printed publication, or machine, and another part in another prior exhibit, and still another part in a third one, and from the three or any greater number of such exhibits draw the con-

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clusion that the patentee is not the original and first inventor of the patented improvement."

If this be true as to the nature of a combination, when an infringer seeks to defeat the same, why is it not equally true where a reissue is sought to be upheld, under an original patent, by importing into the reissue devices not suggested in the original, making thereby a new combination, distinct from the original? In other words, the reissue must be confined to the original "*combination*," and cannot be expanded to make a new combination by introduction therein of devices, new or old, not included in or suggested by the original. *Munson v. Gilbert & Barker Manuf'g Co.* 3 Ban. & A. 595. It must be borne in mind that the court is dealing with a "combination" patent, and that under pretense of a reissue a new combination cannot be upheld.

Therefore the several motions for preliminary injunctions are overruled.

 WASHBURN & MOEN MANUF'G CO. v. GRIESCHE.
 SAME v. FUCHS.

(*Eastern District of Missouri. June, 1883.*)

1. PATENTS—RIGHTS OF ASSIGNEE.—Where, through several assignments, an individual becomes the owner of a number of distinct patents, his rights are no greater than those of his assignors, respectively.
2. SAME.—Where A. and B. each invented and patented a machine for manufacturing wire fencing, the patent in each case being for a combination, and both patents were assigned to C., *held*, that C.'s rights were not infringed by D., who used a machine unlike either A.'s or B.'s, but containing features of both.

Motions for preliminary injunction.

These are suits to recover for the alleged infringement of patent No. 253,781, granted to Sidney M. Stevens, February 14, 1882; patents No. 214,706, granted to Noble G. and

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Thomas D. Ross, April 22, 1879; patent No. 233,116, granted same parties, October 12, 1880; and patent No. 207,710, issued to Jacob Brotherton, September 3, 1878,—all of which are held by plaintiff as assignee. Patents Nos. 253,781 and 214,706 are on machines for manufacturing barbed-wire fencing. Patent No. 233,116 is on barbed-wire cables. Patent No. 207,710 is for an improvement in barbed-wire fencing. The complainant asks for injunctions to restrain the defendants from using machines for manufacturing wire fencing containing inventions secured by the Stevens and Ross patents, and from manufacturing or vending barbed-wire fencing containing the improvements covered by the Brotherton patent. The question of the infringement of the latter patent was not argued, however, and is not referred to in the opinion of the court.

B. F. Thurston, Thomas H. Dodge, Coburn & Thacher, Offield & Fowle, John C. Dewey and Henry Hitchcock, for complainants.

J. M. Holmes, Walker & Walker and Dyer, Lee & Ellis, for defendants.

Also, *Finkelburg & Rassieur and Dexter Tiffany, for Griesche.*

TREAT, District Judge.—As admitted by counsel for plaintiff, no injunction can issue for the manufacture by defendant of machines made for plaintiffs' licensees (4 Ban. & A. 427; 2 Ban. & A. 170; 4 Ban. & A. 441; 3 Ban. & A. 39); but it is contended that he has announced his purpose to manufacture and vend generally, and should be restrained from so doing. That contention might not be considered sufficiently established, if the motion was to depend solely on the evidence as to that point. Inasmuch as the case of the same plaintiffs against Fuchs is also before the court, and the two were argued together at great length, it is advisable to look

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fully into the question of alleged infringement. On this preliminary motion the court does not, as on final hearing, when full proofs are before it, pass definitely upon the validity of plaintiffs' patents, which the defendant expressly assails.

Prior patents have been cursorily examined, merely to ascertain the state of the art, with the view of learning what plaintiffs' patents cover, and whether defendant infringes.

Each of plaintiffs' patents is for "combinations," and not for a single or specific device. It does not appear distinctly what, if any, new devices were used in the combination; and certainly there is in neither a claim for a new device separate from the combinations. While Ross is silent as to any new devices, Stevens states:

"No claim is made herein to the spooling and twisting apparatus shown and described, nor to the barbed fencing itself, as I reserve the right to protect the same by separate letters patent; but I do claim the new improvements herein described, all and several, in delivering apparatus and barbing mechanism, and in the combination of them with each other, and with the spooling and twisting apparatus; that is to say, I claim: (1) In a machine for making barbed-wire fencing, mechanism constructed to simultaneously feed the main fence wires and apply the barbs thereon, in *combination* with means for operating said mechanism, substantially as described."

The other claims are also for "combinations," to ascertain the precise nature of which reference must be had to the specifications; for the claim cannot be construed as designed to cover all possible combinations of mechanism of whatever kind, whereby, through operating machinery, fence wires are simultaneously fed, and barbs fastened thereon. So broad a claim would be void; for prior patents for the same general purpose were in existence, and such a broad claim, closing the avenues to invention, is not permissible.

The combination patents by Stevens and Ross cover then only the combinations of devices, whether new or old, described by them; no other or different combinations. Of course, any combination differing only in the substitution of known mechanical equivalents in any part of the combinations, or in merely changing the form of any one or more of the parts in a way not essential to the result, or producing no new and useful result, would be an infringement. 3 Ban. & A. 96.

The doctrine as to combinations is familiar, and need not be repeated. Do defendants use the combinations, or any of them, described in the Ross patents or in the Stevens patent, taking each patent singly, as if it were the only patent existing? When, through several assignments, an individual becomes the owner of several distinct patents, he can have no greater rights than his assignors respectively. He cannot claim that as no one of the assigned patents is specifically infringed, yet, if they are all considered, and some element of one is imparted into another, and thus by patchwork a really new combination, unpatented, can be formed, therefore the defendant, who uses none of these patents, must be held to infringe. To infringe what? No existing patent. To illustrate: If A. has a patent and B. has a patent, and C. infringes neither; and if A. assigns his patent to D., and B. does likewise, does C., by force of those assignments, become an infringer, when he infringes neither? 3 Fisher, 536; 16 Pet. 336; 15 Wall. 187; 1 Black, 427; id. 78; 2 Fisher, 89. In these, as in some other cases recently argued, there seemed to be an unexpressed, yet implied, thought that the assignment of different patents to a common assignee gave to the latter greater rights than the respective patents conferred on their patentees; so that the assignee, claiming under both, could, by lapping one over the other, or incorporating parts of one into the other, obtain a right, unpatented, which neither of the assignors could separately maintain. No such doctrine can be accepted. Each patent must rest on its own merits alone. *Munson v. Gilbert & Barker Manuf'g Co.* 3 Ban. & A. 595.

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It would be impracticable to place on paper, with no facilities for drawing, even if it were advisable, the detailed and successive elements of the Ross or Stevens combinations, or of defendant's machine. The devices and arrangements in the combination, whether of the Ross or Stevens patent, are not the same as in the defendant's patent in important particulars, and do not operate in the same mode.

It being admitted and apparent that the feeding mechanism operates in the Ross and Stevens patents *intermittingly*, and in the defendant's constantly, suppose defendant applied for a patent as an improvement on the Ross or Stevens machine, in what would his improvement consist? If he discards the former combination instead of adding thereto, would not his combination be a new one instead of an improvement on the old ones? If he omits some of the old elements, then he does not infringe; if he uses the same elements in the same combination, he does infringe, although some of his elements differ in form or modes of immediate operation, provided they are known mechanical equivalents. If, on the other hand, he omits some of the devices in the original or patented combination, and substitutes therefor, not a known mechanical equivalent, but an entirely new device, whereby a more beneficial result is effected, his combination is a new one, and not to be excluded from competition with the old.

It appears that defendant's machines follow none of the combinations under which plaintiffs claim. It is very different in many of its devices from those in the Ross patents, and although it apparently approaches nearer in its feeding mechanism to the Stevens patent, yet it changes essentially some of the parts of the Stevens combination, and in so doing practically reverses the operation, and accomplishes what the Stevens machines could not effect so beneficially. If the views here intimated are not to obtain, then the road to all inventions for feeding barb-wires is closed.

These motions were more fully argued than is usual; and it remains merely to state that, as at present advised, no infringement is sufficiently shown. At the final hearing the

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court may be more fully informed upon the merits of the controversy, and reach a different conclusion from what is now suggested. As the cases now stand, the motions for provisional injunctions are denied.

FOOTE and others v. CUNARD MINING Co. and others.

(District of Colorado. June, 1883.)

1. **SUIT BY STOCKHOLDERS — PREREQUISITE.**— Before a stockholder can sue in his own name he must show to the satisfaction of the court that he has exhausted all the means within his reach to obtain within the corporation itself the redress of his grievances, or action in conformity to his wishes.
2. **SAME — BILL MUST SHOW WHAT.**— In such a case the bill must set forth with particularity the efforts of the plaintiff to secure such action as he desires on the part of the managing directors or trustees, and if necessary, of the shareholders, and the causes of his failure to obtain such action.
3. **SAME — PROBABLE REFUSAL OF CORPORATION TO ACT.**— It is not enough that it appears from the bill that the corporation would probably refuse relief. The rule is imperative that efforts should be made to obtain relief in that direction before suit can be instituted by a stockholder.

In equity. Demurrer to the bill.

MCCREARY, *Circuit Judge*, after stating the facts, delivered the opinion of the court, *orally*, as follows:

The demurrer to the bill will have to be sustained. It is apparent that this is a suit brought in the interest of the Amulet Mining Company, a corporation. It is brought by stockholders of that corporation. The substance of the allegation is that certain property, which in equity belonged to the Amulet Mining Company, was fraudulently conveyed to the Cunard Mining Company, and the relief sought is that the title be transferred from the one corporation to the other. It is, therefore, a suit which ought to be brought by the Amulet Mining Company, unless there is some reason set forth in the bill why it should be brought by the complainants as stockholders in that company. There are no suffi-

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cient allegations in the bill upon this subject. The rule which obtains now in such cases is laid down in the case of *Hawes v. Oakland*, 104 U. S. 450, in which, after having stated the circumstances under which a bill may be brought by a stockholder against the corporation of which he is a member, the courts adds:

“But in addition to the existence of grievances which call for this kind of relief, it is equally important that, before the shareholder is permitted in his own name to institute and conduct a litigation which usually belongs to the corporation, he should show, to the satisfaction of the court, that he has exhausted all the means within his reach to obtain, within the corporation itself, the redress of his grievances, or action in conformity to his wishes. He must make an earnest, not a simulated, effort with the managing body of the corporation to induce remedial action on their part; and this must be made apparent to the court. If time permits, or has permitted, he must show, if he fails with the directors, that he has made an honest effort to obtain action by the stockholders as a body in the matter of which he complains; and he must show a case, if this is not done, where it could not be done, or it was not reasonable to require it.

“The efforts to induce such action as complainant desires on the part of the directors, and of the shareholders, when that is necessary, and the cause of failure in these efforts, should be stated with particularity; and an allegation that complainant was a shareholder at the time of the transactions of which he complains, or that his shares have devolved upon him since by operation of law, and that the suit was not a collusive one to confer on a court of the United States jurisdiction in a case of which it could otherwise have no cognizance, should be in the bill, which should be verified by affidavit.”

Upon the announcement of that opinion the supreme court adopted an additional rule in equity, to which I think, perhaps the attention of counsel in this case has not been called. It is rule 94, and will be found in the 104th volume of the United States Reports, and is as follows:

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"Every bill brought by one or more stockholders in a corporation against the corporation and other parties, founded on rights which may properly be asserted by the corporation, must be verified by oath, and must contain an allegation that the plaintiff was a shareholder at the time of the transaction of which he complains, or that his share had devolved on him since by operation of law; and that the suit is not a collusive one to confer on a court of the United States jurisdiction of a case of which it would not otherwise have cognizance. It must also set forth with particularity the efforts of the plaintiff to secure such action as he desires on the part of the managing directors or trustees, and, if necessary, of the shareholders, and the causes of his failure to obtain such action."

This bill does not set forth that the complainants were shareholders at the time of the transactions of which they complain; it does not set forth any efforts which have been made by complainants to obtain redress from the corporation; it is, therefore, in these particulars insufficient. It is not enough to say that it appears from the bill that the corporation would probably refuse relief. The rule is imperative that efforts shall be made to obtain relief in that direction before such a suit as this shall be commenced in the courts.

On this ground the demurrer to the bill will be sustained.

Bentley & Vaile, for plaintiffs.

Decker & Youle, for defendants.

MAGOWAN and others v. ST. LOUIS RAILWAY SUPPLIES
MANUF'G Co.

(*Eastern District of Missouri. June, 1883.*)

1. PLEADING — COUNTERCLAIMS — FINAL SETTLEMENT. — Where A., a manufacturer, who had agreed to consign a full line of his goods, of the best quality, to B., and not to sell to any one else in the place

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where B. did business, brought suit against B. for a balance alleged to be due for goods consigned under the contract, and B. answered first that there had been a full and complete final settlement of all their accounts between him and A., and set up three counterclaims, alleging, in the first, that a certain sum had been overpaid to A. at the time of the final settlement, by mistake, without stating specifically how the error occurred; in the second, that A. had violated his contract by selling goods to other parties in the place where B. did business, but without stating what goods were sold, or their value; and in the third, alleging generally that he was damaged in a certain sum by reason of the goods consigned not having been of the agreed quantity, *held*, on demurrer to the counterclaims, that they were all bad, because inconsistent with the defense of a final settlement, and also that neither of them stated facts constituting a cause of action.

This is a suit for \$12,155.68, alleged to be due plaintiffs for goods sold and delivered to defendants. The plaintiffs are partners doing business under the firm name of the Trenton Rubber Works, and are manufacturers of rubber goods. Their transactions with the defendants were under and in pursuance of the terms of a contract between them and defendants, the material clauses of which are as follows:

"*First*, the parties of the first part (plaintiffs) agree to consign to the parties of the second part a full line of their rubber goods, such as belting, hose, and packing, and, to the best of their ability, will keep the parties of the second part supplied with a full and marketable assortment; *second*, the parties of the first part agree to make all invoices sent to the parties of the second part at the lowest cash prices and best discounts, and to further allow the parties of the second part a further discount of ten per cent. at monthly settlements; *third*, the parties of the first part agree not to sell or consign any goods to any other house in St. Louis, or vicinity, during the existence of this agreement; . . . *fifth*, all goods shall be fully warranted by the party of the first part, and shall be equal to the best goods in the market, of their respective kinds, and every invoice shall be accompanied with the regular warranty of the party of the first part; . . . *ninth*, the parties of the second part are to render an account of sales on the fifteenth of each month, and remit to parties

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of the first part, with draft for same, and also render an account of stock on hand; *tenth*, on the dissolution of this agreement the parties of the second part are to retain all cut rolls of belting, and pay for same; *eleventh*, thirty days' notice shall be given by either party of their intention to dissolve this agreement."

The contract was terminated by plaintiffs, who allege that at the time of its termination defendant owed them for goods consigned under it, and sold and unpaid for, \$1,151.28, and \$11,005.40 for "cut rubber belting," and for goods belonging to plaintiffs at the time of the dissolution of the contract in possession of defendants, which they refused to return and kept. The answer of defendant prior to the sixth defense sets out a full and complete settlement of all the matters complained of in the petition. The sixth, seventh and eighth defenses set up in the answer are as follows:

"(6) And defendant, further answering, says that the plaintiffs did not keep or perform said contract on their part, but broke the same in this: that plaintiffs failed to keep defendant supplied with a full and marketable assortment of said goods, and the goods furnished were not equal to the best in the market of their respective grades, but were many of them defective and unmerchantable, and defendant was compelled to replace defective goods sold to customers, and did so to an amount in value of \$830.74, which was reported by defendant to plaintiffs, and by them allowed, and because of plaintiffs' failure to supply defendant with goods, it was compelled to buy and did buy in the market, to supply their trade, goods aggregating in value \$1,352.39, which went into defendant's account sales as party plaintiff's goods, and were treated by both parties as advancements, for which defendant was entitled to credit. At the time of the aforesaid accounting there was due from defendant for goods unsold \$1,922.01, as against the same two items of \$1,352.39 and \$830.74, and it was mutually understood at the time that the

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account was accordingly adjusted, but defendant has since claimed that that was a mistake in said adjustment, and that there is now due it from plaintiffs, on account of the matters last aforesaid, a balance of \$261.12, for which it asks for judgment as a counterclaim. (7) And defendant, further answering, and by way of counterclaim, says that the plaintiffs broke said contract in this: that while said contract was in force, and defendant was selling plaintiffs' goods thereunder, the plaintiffs sold and consigned large quantities of goods to other houses in St. Louis and vicinity, to wit: S. M. Rumsey & Co., N. O. Nelson & Co., Fox, Corby & Co., Wabash, St. Louis & Pacific Railway Company, and many others, whereby defendant lost its profits on the sales to said purchasers under said agreement, and was greatly damaged, to the amount of \$20,000, for which it asks judgment, with costs. (8) And for further answer, and by way of counterclaim, defendant says that plaintiffs broke said contract in this: that the goods so furnished to the defendant were not equal to the best goods in the market of their respective kinds, but were exceedingly defective in quality, and many of them were returned to defendant by the purchasers, and defendant lost their trade in rubber goods, and were prevented from making the profits that they would have otherwise made by the sale of plaintiffs' goods under said contract, by all which it was greatly damaged in the further amount of \$1,000, for which it asks judgment and costs."

The plaintiffs demurred to the sixth, seventh and eighth counts of the defendant's answer on the ground that "the facts set out in said three counts do not state facts sufficient to constitute any defense to plaintiffs' action, nor is there any cause of action stated in either of said counts against these plaintiffs."

G. M. Stewart, for plaintiffs.

John G. Chandler, for defendants.

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TREAT, *District Judge*.—It is plain, from an analysis of the pleadings, that these so-called defenses or counterclaims cannot be upheld. As counterclaims, they do not comply with the requirements of pleadings, and are also inconsistent with the other defenses. If the matters were included in the settlement, they cannot be set up against it, except for fraud, etc. If these were errors merely, they should be specifically stated. If other matters were not included, the answer should also state and set out specifically said matters, in order that definite issues may be tried. It is impossible, from the reading of the answer, to understand whether the alleged counterclaims, Nos. 7 and 8, were matters that entered into the settlement or not. If they did, then the settlement must be assailed, as in No. 6; and assailed specifically, which is not done in No. 6.

The demurrer to parts of the answer is sustained.

HALL v. UNION PAC. R'y Co.

(*District of Colorado. June, 1883.*)

1. NEGLIGENCE — WHETHER A QUESTION OF LAW OR FACT — VISIBLE AND OBVIOUS DANGER — CONTRIBUTORY NEGLIGENCE.— Under the circumstances of this case, whether the railroad company was guilty of negligence in allowing a telegraph pole to remain so near to its track that an employee, while in the discharge of his duty, was injured by colliding therewith, is a question for the jury, and the demurrer should be overruled.

HALLETT, *District Judge (orally)*.—The case of Hall against the Union Pacific Railway Company is an action for injuries received by the plaintiff while in the service of the company. He avers that he was a fireman on one of the locomotive engines used on the defendant's road, and that upon one occasion, while engaged in the performance of his duties, it became necessary to take notice of one of the boxes

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of the tender or engine, which had become heated. He was instructed to do this by the engineer. In leaning out of the car for that purpose he came in contact with a telegraph pole which stood within twelve inches of the car. The negligence alleged against the company is in allowing the pole to remain in that position so near to the road. Upon that question there are conflicting authorities, as is usual in a case of this kind. In some cases precisely the same — one, at least, as to the nature of the obstruction, except that the pole was a little further from the track than this one — the company was held liable for allowing the obstruction to remain there. In other cases in point it is held that such an obstruction, being a visible and obvious danger, the servant must take care of himself. My judgment inclines to the opinion, as to this particular obstruction, that it is a question for the jury to determine whether the company was negligent in permitting it to remain so near the track.

The demurrer will be overruled.

*MADEIRA v. MERCHANTS' EXCHANGE MUT. BEN. SOC.**(Eastern District of Missouri. June, 1883.)*

1. **INSURANCE — MUTUAL BENEVOLENT SOCIETY — FAILURE TO PAY DUES.** — Where a certificate of membership, in the nature of a life policy, issued by a mutual benevolent society, provided that the amount of insurance therein specified should be paid in case of the member's death to his beneficiary, on condition that he had "complied with the by-laws of the society," and the by-laws provided that members should forfeit their membership if they failed to pay their dues within thirty days after publication of an assessment, and it appeared from the evidence that the assured had failed to pay an assessment within the time specified, and that it remained unpaid at the time of his death, *held*, that he had forfeited his membership, and that there could be no recovery under his certificate.

This is a suit brought by the widow of Walter C. Madeira to recover insurance upon her husband's life, alleged to be

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due from the defendant, a corporation organized under the laws of Missouri, of which Mr. Madeira is alleged to have been a member at the time of his death. The by-laws of the association provide that any member who shall fail to pay his dues within thirty days after the publication of a notice of an assessment shall forfeit his membership.

Evidence was introduced at the trial tending to show that notice of an assessment had been published about seven months before Mr. Madeira's death, and that at the time of his death he had not paid the amount assessed against him. His certificate of membership was introduced in evidence and was as follows:

"This is to certify that Walter C. Madeira is a member of the Merchants' Exchange Mutual Benevolent Society of St. Louis; that he is a contributor to the benefit and local funds of said society, and upon the condition that the statements contained in his application for membership are true, and that he has complied with the by-laws of the society, then the sum of one dollar for each member of the society at the time of his death will be paid to his beneficiary, upon satisfactory evidence of death being furnished to the board of trustees."

Robert Harbison and Hannibal Loevy, for plaintiff.

Dyer, Lee & Ellis, for defendant.

TREAT, *District Judge*.—The briefs and authorities have been fully considered, and nothing is found to take this case out of the rulings by the United States supreme court. The forfeiture of the policy was complete before death, and nothing in the nature of a waiver to avoid forfeiture is shown. Stringent as are the rules in ordinary life policies, they should be more rigidly applied in mutual associations. If, under the latter, parties do not meet their obligations, whereby losses may be paid, why should not forfeiture of their interests be upheld?

Finding and judgment for defendant.

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UNITED STATES v. KALTMAYER.

(Eastern District of Missouri. March, 1883.)

1. **INDICTMENT—INSTRUMENT ENTERING INTO THE GIST OF THE OFFENSE SHOULD BE SET OUT—EXCEPTIONS TO RULE.**—A bill of indictment for depositing for mailing a notice of where an article for the prevention of conception may be obtained, should set out the notice, unless it cannot be copied without great inconvenience, or is so obscene as to be unfit to go upon public records.
2. **SAME.**—Where there is any reason for a failure to set the notice out, apparent upon the face of the papers or of the indictment, the court will consider it.
3. **SAME—EVIDENCE.**—Where there has been a failure, without excuse, to set the instrument out in the indictment, it will not be admissible in evidence.

Indictment for depositing for mailing a notice of where an article to prevent conception could be obtained.

The notice was not set out in the indictment, and no excuse for the failure to set it forth was given. It was mailed in response to a decoy letter written by a detective, and was addressed to a fictitious person, in whose name the decoy letter was written. It was taken from the mail by the detective at the place to which it was addressed. At the trial it was offered in evidence by the government. The defendant objected to its admission, and the court rendered the following opinion:

William H. Bliss, for the United States.

Thomas C. Fletcher, for the defendant.

MCCREARY, Circuit Judge (orally).—In the case now on trial we have given such consideration as we could to the objections to the evidence offered. The first question is one which arises independently of the provisions of the statute under which the prosecution was instituted. It is as to whether it is necessary, in a case of this character, to set out

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in the bill of indictment the letter or notice which, it is averred, the defendant sent through the mails in violation of the statute. In this indictment the letter, which it is said amounts to a notice, under the provisions of the statute, is not set out, nor is there any reason stated in the indictment why this is not done. It is insisted, however, by the district attorney that it is not necessary to do so in a case of this character.

The general rule upon this subject is, and it has been long and well settled, that an indictment charging an offense consisting of the writing of a certain notice, paper or instrument must set out the writing by words and figures. This is the general rule, and I know of no reason why it should not apply to a case of this character, unless it be that the instrument on which suit is brought, for some reason which appears, cannot be well spread upon the records. It has been held, and I think very properly, that if it is of a character so obscene that it ought not to go upon public records, it is sufficient to describe it with the necessary accuracy, without setting it out in the indictment. I have no doubt, either, of the correctness of the proposition that the matter may be so voluminous that it would not be necessary to set it out. For example, if a man is charged with sending through the mails a book, it is manifestly unreasonable to require that the book be set out in full, although it might be such a book as would be forbidden to be sent through the mails. There are also, doubtless, cases where the prohibited matter sent through the mails consists of pictures, drawings, and things of like character, which would be too indecent to be copied, or, if not indecent, too difficult, or, at least, too inconvenient to copy. Wherever, in any of these cases, there is any reason apparent upon the face of the papers or the indictment why the instrument alleged to have been written and sent through the mails is not set out in the indictment, the court will, of course, always consider the reason assigned.

The general doctrine on this subject is laid down in

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Whart. Amer. Crim. Law very clearly on page 82 and subsequent pages. Cases which involved the consideration of written or printed matter are divided into two classes: *First*. Cases such as forging, passing counterfeit money, selling lottery tickets, sending threatening letters, libel, etc. In cases of this character the words must be fully set out. *Second*. Cases such as larceny, receiving stolen goods, etc. In cases of this character it is enough to give a brief legal description of the character and effect of the instrument. Although the instrument involved may be a written instrument, yet it is not considered necessary, in larceny, to set it out *in hæc verba*; but where the written instruments enter into the gist of the offense, as forgery, passing counterfeit money, selling lottery tickets, sending threatening letters, libel, etc., they must be set out in words and figures. That is the general rule. Now, it is perfectly manifest to my mind that this case falls within the first class to which I have referred. It falls within the cases where the written instrument enters into the gist of the offense. This being so, then the only inquiry here is as to whether there is any reason in the character of the paper offered in evidence why it should not have been set out in the indictment.

We are unable to see any. It is a very brief letter, all written on one side of a small sheet of note paper. There is nothing in it so indecent as to make it improper to spread it upon the record. It contains no language any more indecent than that which is contained in the bill of indictment itself. It therefore falls very clearly, we think, within the rule that it ought to have been set out in the indictment. I am aware of the decision referred to by the district attorney of a court for which we have a very high respect,—the circuit court of the United States for the northern district of Illinois,—to the contrary of this view of the question. It is there held that if the indictment sets out the letter or notice in substance that that is sufficient. But the opinion was based

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upon the authority of a case in the supreme court of the United States, reported in 7 Pet. 138 (the case of the *U. S. v. Mills*). I have examined that case, and I think that, so far from sustaining the proposition contended for by the district attorney, it is an authority to the contrary. It holds that the indictment in that case was sufficient, but they also expressly say that the second count in the indictment sets out the particular letter. On page 142 of the same volume the supreme court say that the instrument was set out in full, and I find nothing in the opinion that sustains the proposition that an indictment in such a case would be good without setting out the instrument. On the other hand the authorities are very numerous. We find this very question decided in the district of New York by three judges, one of whom is now upon the supreme bench of the United States (Justice Blatchford), in an analogous case. It is true, it did not arise under the same statute, but under the statute which forbids the sending through the mails of advertisements of lotteries, or information where lottery tickets can be had. As a matter of course it is apparent that the two statutes are substantially alike in that respect. If a man sends through the mails a notice or information advertising lottery tickets for sale at a particular place, he is indictable under the one statute. If he sends through the mails information about medicine to procure abortion, he is indictable under the other statute. The question whether the instrument must set out the indictment is precisely the same in both statutes.

As a question of authority, we find that there is a decided preponderance of authority for the view which the court takes. There are other questions in this case, of importance, which have been discussed. Of course, in view of what has been said, it is not necessary now to decide them, but I will allude to them. They would probably give me some difficulty if it were necessary for me to decide them. My brother Treat, having given them a good deal of consideration, has

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a very decided opinion, which he can express for himself: They are—*First*, whether a letter in answer to a decoy letter, addressed to a fictitious person, is a notice within the meaning of the statute; or, in other words, is it necessary that this letter or notice should have actually given information to some person in order to be a notice, and not merely intended to give the information?

This point is left in doubt by the ruling of Judge Dillon in the case of the *United States v. Whittier*, 5 Dill. 35. In that case, as in this, the decoy letter was written by a detective, and in an assumed name. It was not sent to the place to which it was addressed, but taken out of the post-office where it was mailed by the detective or some other person, for the purpose of entrapping the party who had written it. Judge Dillon held in that case, on both grounds, that the letter did not amount to a notice, inasmuch as it did not go to its place of destination, and that if it had gone there it would not have been delivered to anybody, inasmuch as it was addressed to a fictitious person, and not to a real person who desired the information. For these several reasons he held that it was not sufficient, and, like every good judge, he decided only what was necessary to be decided in that case. What he would have said if the letter had gone through the mail to its destination, and had there been taken out by a detective, and not by any person to whom it was addressed, does not appear.

To my mind there is great force in the suggestion that, in order to be a notice within the meaning of the statute, it must be addressed to some person, and must be in its nature such a paper as would or could give the notice. If this person is a fictitious person, and if the person receiving the letter is a person who knew beforehand all about it, then the question is whether that is notice.

We sustain the objection to the evidence offered.

Sun Mutual Ins. Co. and others v. Mississippi Valley Transp. Co.

SUN MUTUAL INS. CO. and others v. MISSISSIPPI VALLEY
TRANSP. CO.*(Eastern District of Missouri. June, 1883.)*

1. PRACTICE—EXCEPTIONS TO COMMISSIONER'S REPORT.—Supposed errors in a decree of the court cannot be reviewed on exceptions to the report of a commissioner appointed to ascertain damages.
2. DAMAGES—COMMISSION ON SALES OF ABANDONED PROPERTY NOT ALLOWABLE.—Where property damaged through the negligence of a common carrier was abandoned by the owner to the underwriters, who paid the loss, sold the property, and brought suit against the carrier for damages, *held*, that said underwriters were not entitled to any commission on said sales.

In admiralty. Exceptions to commissioner's report.

The special commissioner appointed by the court to ascertain and report the damages which libelants had suffered by reason of the collision mentioned in the libel in this case, filed a report allowing the libelants, among other things, a commission of two and one-half per cent. on sales which they had made of goods damaged by the collision, and abandoned to them by the owners. The respondent filed a number of exceptions, one of which is to the allowance of said commission.

O. B. Sansum and Brown & Young, for libelants.

Given Campbell, for respondent.

TREAT, *District Judge*.—The rules by which damages are to be estimated were established in the case of *The Scotland*, 105 U. S. 24.

Many of the exceptions filed look to supposed errors in the former decree of the court, which cannot be reviewed in these exceptions. Without passing formally on each of the exceptions named, *seriatim*, the court rules that all commissions charged should be rejected; for, if there was an

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abandonment, technical or otherwise, the title to the property passed to the underwriters. They should not be allowed commissions for selling their own property. True, such commissions were taken into consideration for the ascertainment of the value of the salved property; yet it is not properly chargeable as commissions against the respondent. Therefore the account, properly stated, will be, deducting commissions and interest thereon, as follows: Sun Mutual Insurance Company, \$2,097.90; Hibernia Insurance Company, \$2,660.31; Citizens' Insurance Company, \$4,762.46. All the exceptions are overruled, except these as to commissions, and the decree will be in favor of the respective libelants, as above stated.

UNITED STATES v. IRON SILVER MINING Co. and others.

(District of Colorado. June, 1883.)

1. PATENT FOR LAND — FRAUDULENT REPRESENTATIONS AS TO VALUE — BILL TO SET ASIDE PATENT.—The United States may bring a bill in equity to set aside a patent for land which has been executed by it, upon the ground that the conveyance was obtained by fraud; and where the party obtaining the patent knows that the land is valuable for its lodes of mineral, and suppresses this fact, and falsely represents the very contrary in his application and in his proofs, and thereby defrauds and deceives the land department, and thus obtains a patent, it is a fraud, and a court of equity may set it aside.

In equity.

McCrary, *Circuit Judge (orally)*.—I have considered the demurrer to the complaint in the case of the United States of America against the Iron Silver Mining Company, which is a bill in chancery filed on behalf of the United States to set aside a patent upon the ground that the same has been obtained by fraud. The bill is, of course, somewhat lengthy, but I think I can state the substance of the allegations, so far as they charge fraud, without reading it.

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It is alleged that the land in question was covered with timber; also, that it contained sundry veins, lodes, ledges and seams bearing silver, gold and lead, in rock in place, of great value. It is further alleged that the land was of no value as placer mining ground; that about October, 1879, James A. Sawyer, and others to complainant unknown, discovered sundry lodes, ledges, veins and deposits in rock in place on said land, carrying gold, silver, lead, etc.; that besides these discoveries there were then indications of divers other lodes carrying certain metals, which indications were apparent to persons skilled and expert in that behalf; that there was no placer mining ground on the land; that said Sawyer and others conspired together to cheat and defraud the complainant, and did conspire with certain persons named, and others unknown, to obtain fraudulently a patent for said parcels of land, and for each of them, upon the pretense that the same were placer grounds and subject to entry as such; that they conspired and confederated together to falsely represent to the register and receiver at Leadville, and other land offices of the United States, that the said land was placer mining ground and subject to entry as such, when in truth such was not the fact, and the land was only subject to entry as lodes, leads, veins, ledges or deposits. It is further averred that prior to this time said Sawyer had located the Andrew Jackson lode and the Ferguson lode and the Bonanza Queen lode and the Lizzie Belle lode, all upon the said lands, and divers other lode claims that have been located thereon. It is averred that there was an agreement that Sawyer was to abandon his lode claims and enter the land as placer mining claims for the benefit of respondent. Applications for patents, it is averred, were filed, in which statements were made which were false in the following particulars, among others: In the statement that the lands were placer mining grounds; in the statement that no known vein or lodes of quartz or other rock in place bearing gold, lead or silver existed thereon; and in numerous other par-

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ticulars of less importance, perhaps; all charged to have been false, as the applicants well knew.

It is, of course, well understood that the United States may bring a bill in equity to set aside a patent which has been executed by it, upon the ground that the conveyance was obtained by fraud; and the same principles and rules which would obtain as between individuals will apply to a case where the government institutes such a suit. I suppose, therefore, it is correct to say that if a person, by falsely representing any material matter, deceives the officers of the land department, and thereby induces them to execute to him a patent, upon proof of the fact a court of equity may set the patent aside; and I think that if a man knows that a certain tract of land is valuable for its lodes of mineral,—if he knows it by having located lodes upon it, and having developed them, as this bill alleges was the case here,—and if he knows also that it is not valuable for placer mines, and if he suppresses these facts, and especially if he represents the very contrary of these facts in his application and in his proofs, and thereby defrauds and deceives the officers of the land department, and induces them to execute the patent, it is a fraud, and a court of equity may set it aside.

I think that if the allegations of this bill are true, there is a case for relief within the principles of equity, and the demurrer to the bill must be overruled.

A. W. Brazee, for the United States.

C. G. Symes, for defendant.

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THE DOGGETT, BASSETT & HILLS CO. v. HERMAN and another.

SWEET and others v. SAME.

CLARK and another v. SAME.

FIELD and others v. SAME.

KENDALL and another v. SAME.

WEIL and others v. SAME.

THE GAUSS-HUNICKE HAT CO. v. SAME.

[WILLIAM BABCOCK intervenor in each of the foregoing cases.]

(District of Colorado. 1883.)

1. **ASSIGNMENT FOR BENEFIT OF CREDITORS—COLORADO STATUTE CONSTRUED—PREFERENCE.**—The statute of Colorado requiring that, where an insolvent debtor makes an assignment for the benefit of creditors, the proceeds of the estate (excepting certain preferences allowed to servants, laborers and employees) shall be distributed ratably among all other creditors, is violated by a debtor who pays one of his creditors by delivering to him a part of his property and the same day assigns the balance to an assignee for the benefit of creditors, where the two transactions are simultaneous, or so nearly so as to constitute parts of one and the same transaction.
2. **FRAUDULENT PREFERENCE—NOT NECESSARY TO SHOW THAT ASSIGNEE WAS A PARTY.**—In such a case it is not necessary, in order to set aside the assignment as fraudulent, to show that the assignee was a party to the fraud.

Prior to the fourteenth of October, 1882, the defendants, Max Herman and Solomon Herman, composing the firm of Herman Bros., were merchants doing business at Leadville and at Boulder, in this state, and also having a branch store at Loveland. They had a stock of goods at Leadville valued at about \$20,000, one at Boulder valued at about the same, and one at Loveland valued at about \$3,000. They were, on the said fourteenth day of October, and had been for some time previously, insolvent, owing debts amounting to about \$100,000, the greater part of which had been contracted within the ninety days preceding, and were indebted, among others, to the plaintiffs in these suits. On the fourteenth day of October they made a transfer of their entire

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stock of goods at Leadville to the First National Bank of Leadville, one of their creditors, in payment of a debt of some \$8,000. On the sixteenth day of October they conveyed the stock at Loveland to one Anderson, another creditor, in payment of another debt.

On the fifteenth day of October, the day after their transfer of the Leadville stock as above mentioned, defendants met in Denver for the purpose of considering their affairs, and at that conference the propriety of making an assignment for the benefit of creditors was discussed. On the succeeding Tuesday, October 17th, they again met in Denver, and an assignment was then and there drawn up and executed, conveying all their property to one J. H. Monheimer, as trustee or assignee for their creditors. This instrument was fully executed on the 17th, and nothing remained but the acceptance of the assignee, and the delivery to him of the property. It was expected that the assignee would signify his acceptance and take possession on the morning of the 18th, as he in fact did. On the evening of the 17th, after executing the assignment, Max Herman, one of the assignors, proceeded to Boulder, and there met at the depot, upon his arrival, the intervenor, William Babcock, who was also a creditor of the firm of Herman Bros. At that meeting Herman informed Babcock that the assignment had been executed; that the assignee would probably take possession the next morning; and that whatever was done to secure Babcock must be done quickly. It was accordingly agreed that Babcock should take goods out of the store that night in payment of his debt, including certain debts of others assumed by him, making his entire claim about \$2,500. During the night of the 17th the goods thus turned over to Babcock were removed from the store and deposited in a cellar rented by Babcock for the purpose. The next day the assignee took possession of the goods remaining in the store, and on the twenty-third day of October he sold the entire stock to Babcock for the sum of \$13,000, which was paid,

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and is now in the hands of the assignee. The plaintiffs in these suits sued out writs of attachment on the ground that the assignment to Monheimer was fraudulent and void, and upon the writs thus obtained the marshal levied upon the goods in the hands of Babcock. The latter commenced proceedings in replevin in a state court against the marshal, and by virtue of such proceedings seized the goods, giving the usual bond for the return of the property, or its value, if a return should be awarded. Upon the trial of the replevin suit in the state court it was held that the court had no jurisdiction, because the property was, at the time of the commencement of the replevin suit, in the custody of this court, and judgment was rendered in favor of the marshal for the return of the goods, or, in case a delivery thereof cannot be had, then for the sum of \$3,670, being the value of said goods.

Hugh Butler and John Rogers, for plaintiffs.

Richard M. Whitely, Alpheus Wright and Waldheimer & Jenkins, for the intervenor.

McCRAE, Circuit Judge.—Upon the facts of this case as above stated the following questions arise: *First.* Was the assignment to Monheimer fraudulent and void? *Second.* Did Babcock acquire a good title to the goods by virtue of his purchase from the assignee? By the statute of this state, “to regulate assignments for the benefit of creditors,” approved February 12, 1881, it is provided that a preference may be given in favor of servants, laborers and employees of the assignor to the amount of not more than \$50 to any one person. And it is further provided that “all the residue of the proceeds of such estate shall be distributed ratably among all other creditors; and any preference of one creditor over another shall be entirely null and void, anything in the deed of assignment to the contrary notwithstanding.”

The effect of this statute is, no doubt, to render prefer-

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ences which are provided for in the instrument itself inoperative, while upholding the validity of the assignment; but the question here is whether a preference made by a delivery of part of the debtor's estate to one or more of his creditors in payment of their debts will render the assignment void, where the two acts are simultaneous, or so nearly so as to constitute parts of one and the same transaction.

In the present case it appears that after the assignment was executed, but before the assignee had accepted or actually taken possession of the goods, the assignors, who were hopelessly insolvent, went to Babcock, one of their creditors, and informed him of the assignment, and proposed to turn over to him a part of the stock of goods, in full payment of his demand, before the assignee should take possession on the succeeding day. It was arranged that the transfer to Babcock should be made that night, in order to prevent the goods coming into the hands of the assignee. It would seem clear that this preference given to Babcock and the assignment to Monheimer were parts of the same transaction. The assignment had been executed before the goods were taken out and delivered to Babcock, and possession was about to be delivered to the assignee. Babcock, knowing this fact, took the goods from the store to secure himself in full, to the exclusion of other creditors. The transactions were connected and blended together in such a way as to make it impossible in law to separate them. It cannot be said that the preference was given in good faith before the assignment was executed; nor can it be claimed that Babcock took the preference in ignorance of the assignment. A transaction of this character is a plain violation of the statute above cited. If this assignment can stand, an insolvent debtor in this state may in one day, and by substantially one general arrangement, turn over nine-tenths of his property to favored creditors, and one-tenth to an assignee to be divided among those not so favored. The fact that the preference was not provided for in the assignment itself, but

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by an arrangement or transfer outside of it and contemporaneous with it, shows the intent to evade and violate the statute; for, if all the property were conveyed to the assignee, and the preferences expressed in the assignment, the law would declare the preference void and the assignment good. All the property being within the control of the court in the hands of the assignee, all the creditors could be protected in their rights. But where the preference is by actual delivery to the preferred creditors, for the purpose of keeping it from passing to the assignee, the purpose of the statute, which is equality among creditors, is defeated, and the courts are deprived of the means of enforcing its eminently just and equitable provisions. The assignment must be held to be void.

2. It remains to be determined whether the intervenor, Babcock, acquired a good title to the goods by virtue of his purchase from the assignee. That he had notice of the fraudulent intent of the assignors, and their purpose to evade the provisions of the statute, is apparent from the facts already stated. But it is insisted that the proof does not show that Monheimer, the assignee, was a party to the fraud, and that, therefore, he acquired a good title, and conveyed a good title to Babcock. In our opinion it is not necessary, in order to set aside the assignment as fraudulent, to show that Monheimer, the assignee, was a party to the fraud. The intent of the assignor in making the assignment is the material consideration in determining as to its validity in cases where it is assailed as fraudulent. The assignee is not personally interested; the real parties in interest are the debtor on one side and the creditors on the other. If a debtor conceives the purpose of defrauding a portion of his creditors, and an assignment of his property is a part of the scheme, it would, as it seems to us, be extremely unreasonable to hold that, by concealing his purpose from the assignee, he may be permitted to consummate his fraud as against the creditors, where the assignor himself selects the assignee and

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makes the assignment to him without the knowledge of the complaining creditors. We think the view here expressed is supported by the weight both of reason and authority. Burrill, Assignm. § 337, and cases cited.

As the assignment to Monheimer was manifestly executed for the purpose of depriving these plaintiffs of their rights under the statute of Colorado, and thereby of hindering, delaying and defrauding them in the collection of their debts, and as the intervenor, Babcock, had full knowledge of these facts, we must hold that as to him the assignment was unlawful and fraudulent, and passed no title to the assignee, and that Babcock does not stand in the light of a *bona fide* purchaser in good faith.

The result of these views is that the court finds the issues upon the intervening petition of William Babcock for the plaintiff in the attachment, and judgment will be entered accordingly.

IRON SILVER MINING CO. v. SULLIVAN and others.

(District of Colorado. June, 1883.)

1. **LODE OR PLACER MINE** — R. S. § 2333. — The "vein or lode" of mineral referred to in section 2333 of the Revised Statutes as exempt from a grant or patent of premises in which such vein or lode may be embraced, means a vein or lode that has been discovered, developed or located, and that has definite metes and bounds.

At law.

McCrary, Circuit Judge (orally). — This case is before the court upon demurrer to portions of the answer. It is an action of ejectment, in which the plaintiff proceeds upon a government patent. The answer admits the validity of the patent, and that the plaintiff is the owner of whatever title is conveyed by the patent, but justifies the possession in defendants upon the ground that they are developing a

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certain vein or lode of mineral found within the limits of the property described in the patent. The patent is what is known as a patent for a placer mine, or a placer patent. The court cannot, in an action of this sort, as we all very well understand, go into any question as to whether the officers of the land department were properly advised as to the facts, nor make any inquiry into any question of fraud. The only tribunal that has authority to investigate questions of that sort is a court of chancery, when its powers are invoked by proceedings, instituted on behalf of the United States, for the purpose of setting aside the patent. All that we can inquire into, in a case of this character, is the question, what is conveyed by the patent under the statute by virtue of which it was issued.

The answer in this case sets forth that the portion of the premises occupied by these defendants constituted a vein or lode which was known and claimed to exist in said premises at the time of the application for the patent, and at the time the patent was issued, and the question here is whether, upon the averments of this answer, the premises in controversy, constituting a lode or vein of mineral, must be held, as matter of law, to have been excepted or reserved from the granting clause of the patent; and this question is to be determined upon a consideration of section 2333 of the Revised Statutes of the United States. It is well enough, however, to state precisely what the answer avers. I have, in fact, already done so. It avers that this vein or lode was known and claimed at the time the application was made for the patent. There is no averment that the existence of the lode or vein was known to the patentee or to the party applying for the patent; nor is there any averment that such vein or lode had been claimed or located by metes or bounds; nor is there any averment that it was known, in the sense of having been developed or opened, so that ore had been actually found or discovered; and the question is whether any and all of these averments are necessary in

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order that the right of the public or of these defendants to go upon the premises and develop this vein or lode shall be considered as having been reserved by the patent; and this, as I have said, depends upon the meaning of section 2333 of the Revised Statutes of the United States.

I do not know when I have had greater difficulty in construing any legislation than I have had with this section. I have, however, reached a conclusion which I will proceed to state; and, in order to the more convenient consideration of the section, it may be better to state it in separate paragraphs, as it embraces and embodies several distinct propositions, all somewhat connected together, but still in a sense separate and distinct. Let me state the section, then, without changing the language at all, in paragraphs or subdivisions, as follows:

First. "Where the same person, association or corporation is in possession of a placer claim, and also a vein or lode included within the boundaries thereof, application shall be made for a patent for the placer claim, with the statement that it includes such vein or lode, and in such a case a patent shall issue for the placer claim, subject to the provisions of this chapter, including such vein or lode, upon the payment of \$5 per acre for such vein or lode claim, and twenty-five feet of surface on each side thereof."

Second. "The remainder of the placer claim, or any placer claim not embracing any vein or lode claim, shall be paid for at the rate of \$2.50 per acre, together with all costs of proceedings."

Third. "And where a vein or lode, such as is described in section 2320, is known to exist within the boundaries of a placer claim, an application for a patent for such placer claim, which does not include an application for the vein or lode claim, shall be construed as a conclusive declaration that the claimant of the placer claim has no right of possession of the vein or lode claim."

Fourth. "But where the existence of a vein or lode in a

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placer claim is not known, a patent for the placer claim shall convey all valuable mineral and other deposits within the boundaries thereof."

These are the provisions of section 2333. The most important portion of the section, so far as the question now before us is concerned, is the third subdivision, and this I will read again:

"And where a vein or lode, such as is described in section 2320, is known to exist within the boundaries of a placer claim, an application for a patent for such placer claim, which does not include an application for the vein or lode claim, shall be construed as a conclusive declaration that the claimant of the placer claim has no right of possession of the vein or lode claim."

The first thing that strikes us as an important matter, in the construction of this language, is that we are referred back to section 2320 for a description of the vein or lode which is referred to, and which is not to pass to the patentee unless he has complied with this provision of the statute: "Where a vein or lode such as is described in section 2320." What sort of a vein or lode is described in section 2320? By reference to that section we see that it relates entirely to vein or lode *claims*, and the description which it contains is a description of the metes and bounds of a vein or lode claim. It says:

"Mining claims upon veins or lodes of quartz or other rock in place, bearing gold, silver, cinnabar, lead, tin, copper, or other valuable deposits, heretofore located, shall be governed as to length along the vein or lode by the customs, regulations and laws in force at the date of their location. A mining claim located after the tenth day of May, 1872, whether located by one or more persons, may equal, but shall not exceed, one thousand five hundred feet in length along the vein or lode; but no location of a mining claim shall be made until the discovery of the vein or lode within the limits of the claim located. No claim shall extend more

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than three hundred feet on each side of the middle of the vein at the surface, nor shall any claim be limited by any mining regulation to less than twenty-five feet on each side of the middle of the vein at the surface, except where adverse rights, existing on the tenth day of May, 1872, render such limitation necessary. The end lines of each claim shall be parallel to each other."

Now, it is a vein or lode such as is described in this section 2320 that is referred to in the provision of section 2333 that I have read, and which we are now to consider. We are referred to section 2320 for a description of a vein or lode, which is referred to in the section under consideration; and we see by reading that section that it describes the location, the metes and bounds, the size, and generally describes, not the lode simply, but a lode claim,—one that has been located, which has boundaries, which has been developed; it gives us its dimensions; it declares it shall have been located; it says it shall be a claim in which there has been a discovery of mineral, etc.

I am of the opinion that a vein or lode that has never been claimed; that has not been located; that has not been marked out by metes and bounds, and in which there has been no actual development, or, to use the language of the statute, "discovery of a vein or lode within the limits of the claim located,"—is not a vein or lode such as is described in section 2320. The description must refer to these things. The section describes nothing else, and to its description we are plainly referred.

It follows that the language in the third subdivision of the section must refer to a vein or lode which has been located; which has boundaries; which has a locality; which has had some sort of development; or else it cannot be such a vein or lode as is described in section 2320.

This view of the statute enables us to give a meaning to other portions of the section, which otherwise would be very difficult indeed to do. The words "vein or lode" and

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"vein or lode claim" seem to have been used indiscriminately and interchangeably throughout this section. The words "vein or lode" occur five times; the words "vein or lode claim" occur four times; they are used interchangeably in the same sentence. The first sentence, for example, after employing the words "vein or lode" three times, concludes by referring to the same thing by the words "such vein or lode claim." Now, the use of the word "such" necessarily refers to something preceding in the same sentence, and we can give it no meaning whatever unless we assume that the employment of the words "vein or lode" in the preceding part of the sentence is intended to be synonymous with the words "vein or lode claims" used in the close of the sentence. In the third clause, after using the words "a vein or lode such as is described in section 2320," the same thing is referred to further on in the same sentence as "the vein or lode claim,"—*the* vein, using the definite article "the," which necessarily refers to something which precedes; and we can give it no intelligent meaning unless we assume it refers to the words "vein or lode" in the preceding part of the same sentence; and this construction of the statute is the only one that will enable us to construe the second clause of the section intelligently. Let us look at that a moment:

"The remainder of the placer claim, or any placer claim not embracing any vein or lode claim, shall be paid for at the rate of \$2.50 per acre, together with all costs of proceedings."

That is the price which the law fixes upon the placer mining land, as I understand it, and therefore the evident intent of that language is that any placer claim, not embracing any vein or lode claim, shall be considered as a placer claim, and not as a claim for veins or lodes.

The last clause of the sentence is the one upon which counsel for the defendant bases an argument which is entitled to very great weight, and I have considered it:

"But where the existence of a vein or lode in a placer

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claim is not known, a patent for the placer claim shall convey all valuable mineral and other deposits within the boundaries thereof."

The argument is that the reverse of this proposition must be so, and that if it does contain a vein or lode that is known, the patent will not convey such vein or lode; but what I have said, of course, must be taken into consideration in construing the latter clause of the section, as well as the other clauses, and the words "vein or lode," here, will be held to mean a vein or lode that has been discovered; that has been developed or located; that has metes and bounds. It must mean the same that the same words mean in other portions of the section.

These are my conclusions, gentlemen. The case, I understand, is very important. I have no doubt it is. The question is somewhat doubtful; and while I shall sustain the demurrer to the answer, I think that before rendering final judgments in these cases, if there be a number of them, that counsel had better take this case to the supreme court, and let the matter be finally settled there.

We are disposed to give judgment and stay of execution until you can have a hearing in the supreme court.

In this case let the demurrer be sustained, let judgment go, and let an agreement be made, as counsel suggest, about submitting it to the supreme court.

C. G. Symes, for plaintiff.

Thomas, Patterson and Belford & Reed, for defendant.

UNITED STATES ex rel. HILL v. CAPE GIRARDEAU CO.

(*Eastern District of Missouri. June, 1883.*)

1. PRACTICE — MANDAMUS — SUPERSEDEAS. — Where a judgment had been recovered against a county upon coupons which it had issued, and a peremptory writ of *mandamus* had been granted, command-

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ing the county court of said county to pay the party who had recovered said judgment a certain proportion of a fund in the county treasury which had been collected for the purpose of paying such coupons as the relator had recovered upon, and also commanding the levy and collection of a tax with which to pay any balance remaining due upon said judgment after the application of said proportion of said fund to its payment; and where the respondent had appealed from the order of the court granting such peremptory writ, and had filed an appeal bond, and a *supersedeas* had been granted staying further proceedings under said writ, and the judgment creditor filed a new information entirely ignoring the previous *mandamus* proceedings in the case, and asking for an alternative writ of *mandamus* commanding said county court to pay him on account of said judgment a certain sum alleged to be in the treasury of said county, and to levy and collect a tax sufficient to pay the balance remaining due upon said judgment after said fund had been applied thereon,—*held*, that an alternative writ should be allowed.

Information for an alternative writ of *mandamus*.

On the seventh of April, 1881, John T. Hill, the relator herein, obtained a judgment against Cape Girardeau county for \$6,659.80, and on May 3, 1882, the Ninth National Bank of New York city and Elisha Foote each obtained a judgment against the same party for \$1,609.28 and \$2,070.72, respectively. All of the judgments were upon coupons detached from county bonds of said county, and all of the judgment creditors were represented by the same attorney. At the time the judgments were obtained there was a fund in the county treasury of Cape Girardeau county sufficient to pay about sixty-four per-cent. on them, if applied *pro rata*. The fund had been collected for the purpose of paying said coupons. The county court having refused to pay any part of said judgments, an information for an alternative writ of *mandamus* was filed in each of the cases, alleging the existence of said fund in the treasury of said county, and asking for orders to compel the county court to pay said fund to said judgment creditors, and to levy a tax sufficient to pay any balance remaining due upon their judgments after said fund had been applied upon them. The county court

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did not pay said fund to said creditors, nor did they levy any tax, but filed returns giving reasons why they should not be compelled to do so. These returns were demurred to, and the demurrers were sustained. Thereupon said judgment creditors moved the court to issue peremptory writs of *mandamus* in said cases, and on the fourteenth of November, 1882, peremptory writs were issued, by which said county court was "commanded forthwith to cause to be paid to said relators, or to John B. Henderson, their attorney of record, whatever amount of money may now be and remaining in the treasury of [your] said county to the credit of said township of Cape Girardeau applicable to the payment of the judgments heretofore recorded herein; said amount being whatever sum has not been heretofore paid on judgments and writs thereunder, *pro rata*, rendered upon coupons for which taxes have been collected for the coupons due, of the same year, which said judgments and writs, if any, other than the relator's herein, unless of equal date herewith, are to be excluded in said *pro rata* computation." An appeal was taken to the supreme court of the United States from the order of the court granting a *mandamus* in the case of the relator, and an appeal bond in the sum of \$1,000 having been filed, a *supersedeas* was granted by the court staying all further proceedings under said writ in the case of said Hill. The peremptory writ was duly served and a return made, which need not be here set forth. Subsequently this information was filed by the relator herein. The information entirely ignores all previous *mandamus* proceedings in the case; states the amount of the relator's judgment; that it remains unpaid; that there is \$5,000 in the county treasury of Cape Girardeau county, collected for the purpose of paying the coupons sued on, and asks for a *mandamus* directed to the county court of Cape Girardeau county and to the justices thereof, commanding them to pay the plaintiff, or his attorney of record, the said sum to the credit of said judgment, or as much of said sum

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as remains in the treasury; and if any balance remain due and unpaid on said judgment, interest and costs, after the payment of said sum, he asks that the said court be ordered to levy a tax for the purpose of paying such balance. The amount alleged to be in the treasury by this information differs from the amount mentioned by the previous information. The respondents objected to an alternative writ being granted, on the ground that all further proceedings had been stayed by said appeal and *supersedeas*.

J. B. Henderson and James M. Lewis, for relator.

Henry Cunningham, for respondent.

TREAT, *District Judge*.— If the information had stated fully what the records of the court show, the question to be determined could have been raised on demurrer. True, the court is supposed to know by its record what has been done in a case before it, wherein supplemental or ancillary proceedings are sought; yet no intelligent review of its action could be had, if its judgment were based on records not brought forward or referred to in the ancillary pleadings. It is important that the grave propositions underlying the motion for this alternative writ should be clearly disclosed, and to do so an answer is needed.

When the answer appears, it may be that this court, if it feels at liberty to pass upon the questions *de novo*, will have to review the whole subject involved. It is not proper, at this stage of the inquiry, to discuss those questions. The alternative writ is allowed, in order that the whole subject, in its legal aspect, may be fairly before the court in a way for the final review, if desired, by the United States supreme court.

Let the writ go.

Stinson v. Hawkins.

STINSON v. HAWKINS.

(Eastern District of Missouri. June, 1883.)

1. FRAUD — CONVEYANCE TO HINDER AND DELAY CREDITORS. — A mortgage executed to hinder and delay the mortgagor's creditors, and which purposely exaggerates the mortgagee's demand, and the object of which is known to the mortgagee at the time of its execution, is void as against such creditors.

Motion for a new trial.

For a full statement of facts, and a report of the first trial, see 4 McCrary, 500. The case was tried before a jury. The charge of the court was as follows:

TREAT, *District Judge (orally).* — *Gentlemen of the Jury:* This case that is before you for consideration is one, the like of which often occurs in the administration of justice. It seems that Mr. Hawkins, the defendant, of which there is no doubt, caused an attachment to be issued and levied on the supposed property of Mr. King, his debtor, which, of course, in law, he had a perfect right to do; but on the other hand, it is asserted by the plaintiff that it was Mr. Stinson's property. It was Mr. Stinson's if the mortgage, of which you have heard so much, was a valid mortgage. Now, if that mortgage was a valid one, Mr. Stinson, the plaintiff in this case, who was the mortgagee, has the right to recover from this defendant for the value of the property taken away and lost. As possibly there might be some confusion with regard to the items, I have requested counsel to reduce those items to a short statement here for your guidance; in other words, the chattel mortgage from Mr. King to Mr. Stinson included a great many matters. The attachment issued at the instance of defendant Hawkins did not cover all the mortgaged property.

The primary question would be, in that aspect of the case, what property included in his mortgage the defendant caused to be attached. There is no dispute that the defendant, Mr.

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Hawkins, was a creditor; no dispute that he did attach certain property. Some of that property was included in the mortgage made by King to Stinson before the attachment issued. The amount of the property we have anything to do with now under the writ of attachment is what was included in the Stinson mortgage; so if you reach the conclusion that plaintiff is entitled to recover, the inquiry is as to the value of the specific items which counsel on both sides have stated. If you find for plaintiff, you have to find the value of that specific property at the time the attachment was levied; but the strain of the case, as you have already seen, is more in another direction — that is, as to the validity of this mortgage between King and Stinson.

A debtor has a right to give a mortgage in good faith to secure an honest debt to any creditor. The defendant here contends that the mortgage in question, given by King to Stinson, was not an honest transaction, for Mr. King did not owe Mr. Stinson the amount claimed, or anything near that amount. Hence, the primary inquiry is, was that mortgage, given by King to Stinson, a mortgage made in good faith to secure Mr. Stinson in an indebtedness actually due from Mr. King to him? Suppose, on the other hand, he did owe to Mr. Stinson some sum of money, but not a sum equal in amount, or nearly equal to it; the law says he can't cover up, for the benefit of Mr. King and to defeat other creditors, all his property on a fictitious demand, but should take a mortgage for the amount actually due him, and nothing more. Hence the inquiry is, the amount for which he made this mortgage due to Mr. Stinson. If it was not, leaving out any small miscalculations,—I mean made in an honest way,—if it was not, you will find for defendant; if it was honest,—a *bona fide* demand for which this security was given by King to Stinson,—then you will find a verdict for plaintiff, and finding it you will get the value of the property as herein stated, in the light of the testimony offered.

To make myself more generally understood, it is one of

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the cases that often occur in court. There is a race of diligence among creditors. Each wishes to secure himself; but each must act in good faith, and take security merely for his debt, and not for a fictitious amount, or for a demand largely beyond the amount he owes, in order to hinder, deter or defeat other creditors, or to delay, postpone or involve them in loss. Hence, primarily, the question is, is the amount named in the mortgage, from King to Stinson, a *bona fide* debt due from King to Stinson? If it was, you should find for plaintiff, and assess damages at what you think they are. If, on the other hand, you reach the conclusion that no such debt was due,—that this was a mere scheme to enable Stinson to cover King's property, and hold other creditors at arms-length,—you will have to find for defendant.

The jury found a verdict for the defendant, and the plaintiff thereupon filed a motion for a new trial.

David Murphy, for plaintiff.

Valliant & Thoroughman, for defendant.

TREAT, *District Judge*.—This case has been twice presented to a jury in this court, and once in the state court. The verdict at the first trial here was set aside for satisfactory reasons. At the second, as on the first trial, there was inconsistent testimony, of which the jurors were alone to judge. Counsel for the plaintiff urges several reasons for a new trial, the principal of which is misdirection of the court, and in support of his motion several cases are cited. On a careful review, not only of the cases cited, but of the general doctrine applicable to the main inquiry, it is not seen that the legal views enunciated by the court were erroneous, or calculated to mislead. True, the court might have entered more largely than it did into the nice distinctions governing transfers of property to secure an honest debt, and transfers for purposes fraudulent in fact or in law. The aspect of the case as submitted to the jury did not seem to

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call for such elaborate expositions, for they often serve to confuse rather than instruct. It is apparent to the court that the conveyance of King to Stinson was for a grossly exaggerated demand, and was designed by King to cover his property from the demands of honest creditors, including the defendant, and that Stinson participated therein, knowing King's purpose, and exaggerating the demand secured, in order that all of King's property might be saved. This was not an ordinary case of diligence, permissible in law, but one that the law, under the facts presented, pronounces void. There is no adequate reason to disturb the verdict.

DENVER & N. O. R. Co. v. ATCHISON, TOPEKA & SANTA FE
R. Co.

(District of Colorado. June, 1883.)

1. **CONTEMPT—POWER OF PUNISHMENT UNDER—U. S. REV. STAT., SEC. 733.**—In proceedings under sec. 725, Revised Statutes of the United States, for contempt of a decree of court, the court has power to punish by fine and imprisonment only, and cannot make an order in the nature of further directions for the enforcement of the decree.
2. **SAME—PROOF REQUIRED—PRESUMPTION OF INNOCENCE.**—In order to justify the punishment prescribed by the above statute, the fact of the guilt of the accused must be clearly established. If the terms of the decree are ambiguous, or if men of equal intelligence might honestly differ as to their meaning or construction, defendant is entitled to the benefit of a presumption of innocence until the court has, by further directions, made the meaning plain, after which disobedience must be punished.
3. **FORMER DECREE IN THIS CASE HELD VIOLATED BY REFUSAL TO CHECK BAGGAGE BEYOND DEFENDANT'S LINE—ADVICE OF COUNSEL.** The action of the Atchison, Topeka & Santa Fe R. R. Co., in refusing to check baggage beyond its own line, held to be a violation of the decree entered in this case and reported in 4 McCrary, 325, ordering it not to discriminate against the plaintiff. Inasmuch, however, as said refusal was under the advice of counsel, no penalty should be imposed therefor.

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4. **FORMER DECREE CONSTRUED—COMPETITION TO BE FAVORED.**—The decree above named does not, either by its terms or by necessary implication, forbid a change in the division of freights and fares between the Atchison, Topeka & Santa Fe R. R. Co. and the Denver & Rio Grande R. R. Co., so as to decrease the share of the latter. Courts ought not to interfere for the purpose of preventing any reduction in rates which results from competition between rival lines merely.

This cause was before the court in July, 1882, upon final hearing, and the opinion then announced, together with the decree rendered, will be found reported in 4 McCrary, on page 325. By the decree, defendant was required to carry goods in connection with plaintiff for a reasonable freight money, not exceeding the rates demanded by defendant for like freight from the same initial point or terminus to the city of Pueblo, when the same is to be delivered to the Denver & Rio Grande Railway Company, or any other company or person operating a road in competition with the plaintiff.

By reference to the original case, it will be seen that the defendant operates a line of railroad from the Missouri river to Pueblo, Colorado, and that it had a running arrangement with the Denver & Rio Grande Railway Company to carry its freight from Pueblo to Denver. Between these points the plaintiff operates a line of railroad in competition with the said Denver & Rio Grande, and the complaint was that the defendant had, in violation of its duty under the constitution and laws of Colorado, and in violation of its duty as a common carrier, refused to interchange business with the complainant company upon the same terms extended to the Denver & Rio Grande. The decree was for complainant, and the present suit is brought to punish the defendant as for contempt for violating said decree.

After the decree was entered a change was made in the terms of the agreement between the defendant and said Denver & Rio Grande Company, by which change the

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latter company relinquished all claim upon the charges for through freight, except five cents per hundred pounds, though previous to said decree it had received much more. It also relinquished a large part of its share of the passenger rates. It voluntarily reduced its share of the receipts on through business from about twenty-two per cent. to about four per cent. This agreement is charged to be a violation of the decree.

The defendant also refused to check baggage beyond its own line when presented by persons holding tickets over plaintiff's line, and this is also charged to be a violation of the decree. Other charges were made and considered, but these are the only matters pertinent to the opinion now to be reported. The case was originally heard before Hallett, district judge, who made the following order:

"This cause having heretofore been heard upon the answers of the said defendant to certain interrogatories propounded by the plaintiff, touching divers alleged violations of the decree of this court, heretofore entered herein, and it appearing to the court that the said, the defendant, hath ever since the said decree became of force exacted upon all freight by it carried in connection with the said plaintiff the whole of the through rate theretofore wont to be charged by it and the Denver & Rio Grande Railway Company, between Kansas City and the city of Denver, save the sum of five cents per hundred pounds, and upon all passengers carried by it in connection with the plaintiffs has exacted the whole of the through rate theretofore demanded by it from passengers carried in connection with the Denver & Rio Grande Railway Company between the Missouri river and Denver, save the sum of seventy-five cents for each passenger. Whereas, on the basis of the through rates and fares in force at the time said decree was entered, the said plaintiff was entitled to receive as its division twenty-two per cent. of the through rate upon all such freights, and twenty-two per cent. of the through rate upon all such passengers;

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and still is entitled thereto, and that ever since the first day of April last past the said defendant, while wont to check beyond its own railroad the baggage of passengers, traveling over its railroad and other railroads in connection with the Denver & Rio Grande Railway upon coupon tickets issued and sold by the Denver & Rio Grande Railway Co., hath refused to check beyond its own railroad the baggage of passengers traveling thereon, and the railroad of plaintiff and other railroads, upon coupon tickets issued by the said plaintiff, all which acts, doings and omissions of the said defendant are in violation of the said decree, whereby the defendant is guilty of the contempts charged against it in respect thereof; but it appearing to the court that the acts, omissions and refusals of said defendant in the behalf aforesaid were done and omitted under the advice of counsel, it is

“Ordered, that the said defendant pay to the plaintiff the difference between the sums so by defendant exacted, and the sum to which plaintiff was entitled as aforesaid, upon the basis or division aforesaid, upon all such freights and passengers carried by defendant and plaintiff in connection, since the first day of April last, and that it be referred to Thomas T. Player, Esq., as master in chancery of this court, who is hereby appointed for that purpose, to take an account of what freight and passengers have since the first day of April last past been carried by said Denver & New Orleans R. R. Co. in connection with the defendant, and of moneys which remain due from defendant to plaintiff on account thereof.

“Ordered, that the plaintiff be at liberty to proceed with the said account at any time upon five days' notice to defendant's solicitors, and that for the better clearing of the said account each party be required to produce before the master all transfer sheets, manifests, bills of lading, books of account, and other books referring to the said business.

“Thereupon comes Henry C. Thatcher, Esq., one of the counsel for said defendant, and upon his motion it is ordered

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by the court that the said accounting and the order of the court in respect to the above alleged contempts be suspended, and of none effect, until the question touching the same can be argued before the Honorable George W. McCrary, circuit judge, and until the said circuit judge shall make order in the premises.

"And it further appearing to the court that the said defendant hath further violated, and said decree, in this, to wit, that at divers times since the said decree became of force, said defendant hath refused and omitted to deliver to the said plaintiff divers quantities of merchandise and freight consigned to the plaintiff or directed by the consignee thereof to be shipped over the railroad of plaintiff:

"It is therefore considered by the court that the defendant, for its contempt last aforementioned, pay a fine of \$400, together with the costs of this proceeding, to be taxed by the clerk, and that execution issue therefor."

Wells, Smith & Macon, for plaintiff.

Geo. R. Peck, for defendant.

Proceedings for contempt.

MCCRARY, Circuit Judge.— Upon the questions reserved for my consideration by the order herein of June 1st, I have reached the following conclusions:

1. This is a proceeding in its nature criminal, and which must be governed by the strict rules of construction applied in criminal cases. Its purpose is not to afford a remedy to the party complaining, and who may have been injured by the acts complained of. That remedy must be sought in another way. Its purpose is to vindicate the authority and dignity of the court. In such a proceeding the court has no jurisdiction to make any order in the nature of further directions for the enforcement of the decree. *Van Zandt v. Argentine Mining Co.* 2 McCrary, 642 (S. C. 8 Fed. Rep. 725); *Haight v. Lucia*, 36 Wis. 355; *In re Chiles*, 22 Wall.

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163; *Durant v. Sup'rs*, 1 Woolw. 377; *New Orleans v. Steamship Co.* 20 Wall. 392.

2. The power of the court is limited to the punishment of the party charged with contempt, and, under the provisions of section 725 of the Revised Statutes of the United States, such punishment must be by fine or imprisonment. That section provides that circuit courts shall have power "to punish by fine or imprisonment, at the discretion of the court, contempts of their authority." "This enactment," says the supreme court, is "a limitation upon the manner in which the power may be exercised, and must be held to be a negation of all other modes of punishment." *Ex parte Robinson*, 19 Wall. 512.

3. To justify the punishment prescribed by statute for contempt, the fact of the guilt of the accused must be clearly and explicitly established to the satisfaction of the court. If the terms of the decree are ambiguous, or if men of equal intelligence might honestly differ as to their meaning or construction, the defendant is entitled to the benefit of the presumption of innocence until the court has, by further directions, made the meaning more plain, after which disobedience must be punished.

4. I am of the opinion that the defendant has violated the decree by its refusal to check baggage beyond its own line; but I agree with the district judge in the opinion that, as this refusal was under the advice of counsel, no punishment should be inflicted for past offenses in this regard.

5. So much of the order of June 1st as required defendant to pay complainant certain sums, and directs an accounting, is not a proper order in this proceeding, being in the nature of further relief to the complainant, and not in the nature of punishment for contempt by either fine or imprisonment.

6. The decree does not, either by its terms or by necessary implication, forbid the change in the division of freights and fares now complained of; and there is, therefore, no case for

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the punishment by fine or imprisonment of the defendant for assenting to such change and acting thereon.

7. It is not necessary to say more upon the subject of the change of the division of freights and fares, but inasmuch as that subject has been exhaustively argued by counsel, I think it proper to state briefly my conclusions upon the merits of the controversy respecting it.

In my opinion the courts ought not to interfere for the purpose of preventing any reduction of rates which results from competition between rival railway lines. If, as a result of the struggle for business between such competing companies, they voluntarily offer to carry, either for the public generally or for connecting lines, at less than a remunerative rate, it is their own business. They are not obliged to carry for less than a fair and reasonable rate; and if they voluntarily do so for the purpose of outstripping a rival, they cannot complain of those who avail themselves of the low rates offered. It follows that if the defendant has done nothing more than to avail itself of the low rates offered to it, as a result of the struggle for business between complainant and the Denver & Rio Grande Company, then there is no cause for relief against defendant because of its action in this regard, either in this proceeding or in any other.

Acting, doubtless, upon this view of the subject, the complainant, in the affidavits filed as the basis of this proceeding, charged that the change in the division of freights and fares was, as between the defendant and the Rio Grande Company, a false pretense,—a mere sham,—no change in fact having been made in the division, as it was before April 1st, when the pretended change took effect.

If this allegation was sustained by the proof, the court would not hesitate to hold it to be a flagrant violation of the decree, and to punish it accordingly. But I am bound to say it is not sustained by the proof. Numerous affidavits are filed by defendant, in which the deponents swear that

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the reduction was voluntarily made by the Denver & Rio Grande Company, and that the defendant had nothing whatever to do with it. These witnesses all affirm that the Rio Grande Company has no arrangement whatever with the defendant whereby it is to receive any other or better terms than those accorded to the plaintiff. The answers under oath, filed by the officers of the defendant company, to interrogatories propounded by complainant, are to the same effect. On the other hand, there is nothing but probabilities and circumstances. It is impossible, upon this proof, for me to say that the collusion and conspiracy charged have been established.

In my judgment, the complainant must, in order to be entitled to relief on account of the change in the division of freights and fares complained of, establish by satisfactory proof that the other two companies have combined against it, and made the change complained of for the purpose of defeating the operation of the decree, and of depriving the complainant of the benefits thereof. This established, the complainant might, either in a proceeding for contempt or an application to the court for further orders, or in an original proceeding, obtain the necessary relief; but from the consequences resulting from a war of rates merely, and from a struggle with a rival company to secure business, the courts cannot relieve. *In re Cary*, 10 Fed. Rep. 622, and note, 629.

MOLENBROCK and others v. ST. LOUIS & CLARKSVILLE
PACKET Co.

(*Eastern District of Missouri. June, 1883.*)

1. ADMIRALTY — TOWAGE CONTRACT — NEGLIGENCE.—The owner of a steamboat is only bound to exercise ordinary care, skill and diligence in performing a towage contract.

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In admiralty. Libel *in personam*.

The libelants state in their libel that the libelee agreed with them that its steamboat Dora should tow a barge which had been chartered by libelants, and loaded with wheat, from the Illinois river to St. Louis, Missouri; that said steamboat took the barge in tow and proceeded on its way down the river, but before reaching its destination, and while nearly half a mile outside of the main channel of the Mississippi, and while attempting to run through a chute in said river, near the eastern shore, through gross negligence on the part of the officer of said steamboat, ran said barge into a submerged snag, which penetrated the bottom of the barge and caused it to sink; and that both barge and cargo were a total loss. Wherefore libelants asked for the damages they have suffered. The libelee denies that there has been any negligence on the part of its employees, and alleges that the loss was occasioned by the unseaworthiness of libelants' barge, and its being overloaded.

Dyer, Lee & Ellis, for libelants.

Given Campbell, for libelee.

TREAT, *District Judge*.—The rules of law by which the rights of the parties are to be determined are not disputed. This was a towage contract; the decisions concerning which are collected in *Desty, Shipp. & Adm.* 339 *et seq.* The libelee was bound to exercise ordinary care, skill and diligence. In this, as in most cases of like character, there is a great diversity of opinion by experts. Under such diversity it is the duty of the court to reconcile diversities by seizing upon physical facts in the light of which truth can be ascertained. The contention by libelants is that respondent's tow-boat ran down, at the then stage of water, an unsafe channel, whereby the injury occurred. On the other hand, it is contended that the channel pursued at the then stage of water was the usual and proper channel; also that the barge

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in tow was old and unseaworthy, considering the cargo that it was carrying.

An analysis of the voluminous evidence shows that the channel in which the barge was towed was reasonably proper at the time. This is evidenced from the fact that other vessels, immediately before and after the accident, passed up and down by the sunken barge in safety, and that soundings immediately thereafter showed sufficient depth of water. Without entering into a consideration of the seaworthiness of the barge, which might or might not have contributed to the disaster, it is clear to the court that there was no act of negligence, within the rules of the law, by means of which the respondent can be held liable.

HOLLAND and others v. RYAN and others.

(District of Colorado. June, 1883.)

1. JURISDICTION OF FEDERAL COURT — CITIZEN. — To give jurisdiction to the federal courts on the ground of citizenship, all the plaintiffs who have an interest in the subject matter must have a different citizenship from the defendants.
2. SAME — FEDERAL LAWS. — An averment that the action involves the "construction and consideration of the laws of the United States on the subject of mines and mining, and the validity and title to mining claims occurring and arising thereunder," held insufficient to show a cause of action arising under the laws of the United States. The complaint must state there is a controversy between the parties as to the meaning and effect of those laws. It is not sufficient that the right to recover is based upon an act of congress.

Motion to dismiss.

HALLETT, *District Judge (orally)*. — An action of ejectment was brought by six persons against four to recover two mining claims. The title, as stated in the complaint, appears to be in four of the plaintiffs. F. E. Holland and B.

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M. Hypes, two of the plaintiffs, own a considerable interest in the claims, and they are citizens of the state of Missouri. Two of the plaintiffs, J. W. West and W. M. B. Worthington, own one-twelfth interest each. Charles A. Jones and Charles A. Daily are lessees of the plaintiffs. West and Worthington, Jones and Daily, the two plaintiffs who own a twelfth interest of the claims, and the lessees, are citizens of this state; the defendants also are citizens of this state; and the question is whether the action can be maintained here by these plaintiffs against these defendants. On that the rule is that all of the plaintiffs who have any interest in the property must have a different citizenship from the defendants. Assuming that Jones and Daily, as lessees, have no substantial interest in the property, or, at least, that they need not be joined in this action, West and Worthington remain, having a twelfth interest each. They have no standing in this court, and cannot prosecute an action here against other citizens of the same state.

The averment in the complaint that this is an action that involves the "construction and consideration of the laws of the United States upon the subject of mines and mining, and the validity and title to mining claims occurring and arising thereunder," is not sufficient to show a cause of action arising under the laws of the United States. The question which arises under those laws, and the difference of opinion between parties as to the meaning and effect of those laws, is to be stated in the complaint to show such cause of action.

The authority which we follow on that subject is *Gold Washing & Water Co. v. Keyes*, 96 U. S. 199. In that case it was decided that there must be a controversy between parties as to the meaning and effect of a law of the United States. It is not sufficient that they base their right to recover upon the acts of congress relating to mining claims, but there must be some dispute between the parties as to the construction of those laws.

The action is one which cannot be maintained in this

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court, and will be dismissed, pursuant to the motion of the defendants.

See *Kerling v. Cotzhausen*, 16 Fed. Rep. 705; *State of Illinois v. Chicago, B. & Q. R. Co.* id. 706; *Adams Exp. Co. v. Denver & R. G. R'y Co.* 4 McCrary, 77; *Myers v. Union Pac. R'y Co.* 8 id. 578; *Cruikshank v. Fourth Nat. Bank*, 16 Fed. Rep. 888; *Bates v. New Orleans, B. R. & V. R. Co.* id. 294; *Ellis v. Norton*, id. 4.— [Ed.]

A. Danford, for plaintiffs.

D. T. Sapp, for defendants.

LITTLE PITTSBURGH CONSOLIDATED MINING CO. v. AMIE MIN-
ING Co.

(District of Colorado. July, 1883.)

1. MINING CLAIM — LOCATOR DISPOSING OF PART.— After a mining claim has been properly located, the owner of it may sell any part without prejudice to his right to hold the remainder. He may dispose of it by gift or grant in any way that seems proper to him, and the mere fact that a part of it is transferred to another will not defeat the right of the locator to other portions which were not so sold, disposed of, or surrendered.
2. SAME — PREVIOUS LOCATION.— A location of a mining claim cannot be made by a discovery shaft upon another claim which has been previously located, and which is a valid location.

At law.

HALLETT, *District Judge (orally)*.—The Little Pittsburgh Consolidated Mining Company brought an action of ejectment against the Amie Mining Company to recover the Winnemucca mining lode. The defendant answered, among other things, that the plaintiff at one time, without stating what time, set up a claim to the Winnemucca lode, and also to the Little Pittsburgh lode. At that time the Winnemucca lode was owned by other parties, claiming adversely

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to the plaintiff, and the Little Pittsburgh lode embraced or covered all of the Winnemucca claim except the ground in controversy in this suit, which is a small strip upon one side or the other—I don't remember the exact location. The ground then claimed by the plaintiff as a part of the Little Pittsburgh claim included the discovery shaft of the Winnemucca claim. The owners of the Little Pittsburgh claim applied for a patent to that claim, and were met by an adverse proceeding on the part of the owners of the Winnemucca claim, which was settled in some way, by which the claimants of the Little Pittsburgh property became entitled to their entire claim, including the discovery shaft of the Winnemucca claim. The adverse claim was withdrawn from the land office, and the Little Pittsburgh people were allowed to make the entry of their lode. There is some confusion in the statements of the answer as to who were the parties owning these claims, respectively, at that time. In some parts of the answer it appears that the present corporation, the Little Pittsburgh Consolidated Company, then claimed and owned the Little Pittsburgh claim, and conducted the proceedings for patent; and from other parts of the answer it would seem that it was not this company, but some one from whom it has derived title. But the substance of the answer is that by the withdrawal of the adverse claim to the application of the Little Pittsburgh claim for a patent, the Winnemucca parties abandoned their claim entirely, and no right or title can be now set up under that location. This position appears to be to the effect that one who owns a mining claim must at all events hold on to his discovery shaft until he has obtained a patent for his claim. If he yields it to another in any way, by conveyance or otherwise, he thereby abandons the rest of his claim.

I do not see upon what principle such a conclusion can rest. After a claim has been properly located, the owner of it may sell any part without prejudice to his right to hold the remainder. He may dispose of it by gift or grant in any

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way that seems proper to him. What was done in this instance by the Winnemucca parties and the Little Pittsburgh parties is not stated. Whether the Winnemucca parties yielded voluntarily to the Little Pittsburgh people, or made sale to them, or in what way they disposed of their interest, if they had any, in this claim, is not stated. But I do not think that can be material. Any concession that they may have made to the Little Pittsburgh people is to them only, and is not available to any other person.

It has been decided, it is true, in the supreme court of this state, and in this court also, that a location may not be made by a discovery shaft upon another claim which has been previously located, and which is a valid location, but that doctrine has nothing to do with the point in controversy here. For all that appears, the Winnemucca may have been the better location, and it may have been sold by the Little Pittsburgh parties, or disposed of in some way. The mere fact that a part of it was transferred to the Little Pittsburgh parties is not enough to defeat the right of the locators to other portions which were not sold, disposed of, or surrendered.

The demurrer to the answer will be sustained.

Rockwell & Bissell, for plaintiffs.

Markham, Patterson & Thomas, for defendants.

MILLER v. UNION PACIFIC R'y Co.

(District of Colorado. June, 1883.)

1. RAILROAD COMPANY — NEGLIGENCE.— Negligence is the failure to use ordinary care,— that is to say, such care as a person of common prudence would exercise under the circumstances; and where the complaint is that the plaintiff has been injured by the negligence of a railroad company, the question for the jury is, did the railroad company fail to discharge any duty it owed to the plaintiff?

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2. **NEGLIGENCE — PUSH CARS.**— Where push cars are furnished by a railroad company to be used in transporting materials, and to be propelled by pushing, it is not negligence in the company to fail to supply them with brakes or other means of controlling their movement.
3. **MASTER AND SERVANT — RESPONSIBILITY OF MASTER FOR ACTS OF VICE-PRINCIPAL.**— If the master, or another servant standing towards the servant injured in the relation of superior or vice-principal, orders the latter into a situation of greater danger than, in the ordinary course of his duty, he would have incurred, and he obeys and is thereby injured, the master is liable, unless the danger is so apparent that to obey would be an act of recklessness.
4. **SAME — WHO IS A VICE-PRINCIPAL.**— Where a master employs one servant and requires him to work under the orders of another, and gives the latter power to dismiss the former at his pleasure, the latter is a superior servant or vice-principal, and stands in the place of the master when acting in the scope of his powers.
5. **RAILROAD COMPANY — USAGE OR CUSTOM — USE OF PUSH CARS TO CARRY EMPLOYEES.**— Although push cars are originally furnished to be used only to carry materials, yet if the company permits their use to transport workmen from place to place for such a time and so generally as to become a custom of the road, it may be held to have authorized such use.

MCCRAEY, *Circuit Judge (charging jury).*— The plaintiff, in his complaint, avers that he has suffered personal injury by reason of the negligence of the Kansas Pacific Railroad Company, and that the defendant is liable therefor. That the plaintiff was injured while in the employ of said Kansas Pacific Railroad Company, substantially as alleged, is not disputed; but the defendant interposes three separate defenses, which it is your duty to consider. These are— *First*, that the Kansas Pacific Railroad Company was not guilty of negligence as charged; *second*, that the plaintiff was guilty of negligence, which contributed to his injury; *third*, that if there was any negligence other than that of the plaintiff, it was the negligence of his fellow-servants engaged in the same common service with him, for which the company is not liable.

If you find from the evidence that either of these de-

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fenses has been sustained, you will find for the defendant. If you find that neither of them has been sustained, and that plaintiff has suffered injury without negligence on his part, and by reason of the negligence of said Kansas Pacific Railroad Company, then you will find for the plaintiff.

You may give your attention, in the first place, to the question whether the company was guilty of negligence. Negligence is the failure to use ordinary care; that is to say, such care as a person of common prudence would exercise under the circumstances. In the present case, the question may be stated thus: Did the Kansas Pacific Railroad Company fail to discharge any duty it owed to the plaintiff?

It is contended on behalf of the plaintiff that the company failed to discharge its duty towards the plaintiff in two particulars, to wit: *First*, that it failed to furnish him a safe means of transportation from the coal mine to the station, when he was required by its order to go from the former to the latter place; and *second*, that by its agent, McGrath, who was placed in a position of authority over him, it ordered him into a position of unusual peril, by reason of which he was injured.

As to the first of these particulars, it is to be observed that, to sustain it, the plaintiff is required to prove to the satisfaction of the jury that the push car, upon which the plaintiff was riding at the time of the accident, was furnished by the company to be used for the transportation of employees from place to place upon the line. There is no evidence tending to show that the push car was originally furnished for this purpose. It is clear that if the plaintiff can recover at all, it is not upon the ground that the push car was constructed and placed upon the road for the purpose of being used to transport employees, and was not furnished with brakes, so as to be safely used for that purpose. As the cars were not originally intended to be used for this purpose, but to carry material only, and to be propelled by pushing, it was not negligent in the company to omit to provide brakes

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or other means of retarding their movement. Whether the company, by permitting the employees to use push cars for the purpose in question, and by its order to McGrath, to be hereafter referred to, has so far consented to such use as to be bound, is a question for you to consider, under the evidence and instructions of the court, which will be presently given you.

Between a railway company and its employees there exists the relation known in law as that of master and servant. When the servant enters into this relation he assumes all the risks ordinarily incident to the duty he undertakes to perform, and on the other hand the master (the railroad company) binds itself not to expose him to any extraordinary risks, or such as do not ordinarily belong to the employment. In accordance with this rule, the law is that if the master, or another servant standing towards the servant injured in the relation of a superior or vice-principal, orders the latter into a situation of greater danger than in the ordinary course of his duty he would have incurred, and he obeys, and is thereby injured, the master is liable, unless the danger is so apparent that to obey would be an act of recklessness. A servant may obey orders coming from one having authority over him, with power to discharge him for disobedience, unless to obey would expose him to danger so glaring that a prudent man would refuse to enter into it even under such orders. In order to make out the allegation that the company was negligent in ordering the plaintiff into a position of unusual danger, the plaintiff must show to your satisfaction — *First*, that McGrath, the foreman, was invested by the company with power to order him to get upon the push car, to be carried to the station, and to enforce such order by a dismissal of the plaintiff from the service, or, what is equivalent, by a request or recommendation which plaintiff knew would result in his dismissal; *second*, that by obeying said order the plaintiff subjected himself to extra danger; and *third*, that the danger was

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not so apparent and glaring as to make it an act of recklessness on his part to obey.

Had McGrath authority from the company to use the push car for the transportation of the carpenters from the coal mine to the station? This is a very material question in the case, and one which you must determine from the proof. It is clear that McGrath had authority to order plaintiff from the coal mine to the station for the purpose of taking the train to Cheyenne Wells. Probably he would have possessed this authority as foreman merely; but, however this may be, it is in evidence that he had express orders from the proper officer of the company to take the carpenters, including plaintiff, by the next train to Cheyenne Wells, in order that they might perform certain duties there.

He was authorized by this order to employ such means as were usual and proper to transport the men to the station; and what means would be proper might depend to some extent upon whether great haste was necessary or not. If, in order to carry out his instructions, it was necessary to proceed to the station in a very short time, or if he supposed in good faith that haste was necessary, then he was justified in choosing, among several modes of conveyance authorized by the rules or usages of the company, that one which would enable him to reach the station in the shortest time. But he was not authorized, even for the sake of speed, to adopt a mode of transportation not permitted or sanctioned either by the rules or the customs of the company. If it was customary or usual upon the lines of the Kansas Pacific Company to use push cars for such a purpose, then, under the circumstances, McGrath was authorized by the order under which he was acting, and by such custom, to use the push car in question for that purpose. The company cannot, however, be held to have authorized this use of the push car by McGrath, unless the previous similar use of such cars on the same road had been so common as to be known to the officers having charge of the management of the branch road,

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or so that, if not in fact known to them, it might have been known by the exercise on their part of ordinary diligence. It is not necessary that such usage or custom should have existed for a very long period, but it is necessary that it should have existed long enough, and been sufficiently general and notorious, to enable the jury to say that it was an established custom or usage of the road. If the company permitted its employees to use the push cars in this way, and made no objection and took no steps to stop or prevent such use until it became habitual, the employees of the company had a right to assume that it was authorized, and McGrath had the right to resort to it in executing the orders above mentioned; but if, on the other hand, such use of push cars had only been occasional, and was not general or common, then the company was not bound by it.

It is for the jury to say upon the evidence whether McGrath was authorized by the usage of the company, and in view of the law as I have stated it, to use the push car to carry plaintiff and the other carpenters to the station. If he was so authorized, then the jury will proceed to inquire whether he ordered plaintiff to get upon said car to be so transported, and if so, whether, by reason of the character of the grade, the load upon the car, the absence of brakes or other means of retarding the motion of the car, it was extra hazardous for plaintiff to obey the order. If you find that it was, then you will come to the question whether plaintiff was guilty of negligence in obeying the order; or, in other words, the question of contributory negligence. What I have already said will in part apply here. Plaintiff cannot be charged with negligence in obeying an order of his superior, unless he acted recklessly in so obeying. He was not bound to examine the push car, nor to make inquiry concerning the grade, but was at liberty to rely upon the implied promise of the company not to subject him to unusual dangers, unless, from what was patent to him, he must have known that to obey the order would be an act of reck-

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lessness. If you find that McGrath was plaintiff's superior, with power to order him to get on the push car to be carried to the station, then the rule I have just stated must guide you in deciding the question of contributory negligence.

Defendant insists that the plaintiff and McGrath were fellow-servants, engaged in the same common employment, and that, therefore, the company cannot be held liable in this case. The rule upon this subject is this: If the company employed plaintiff and required him to work under the orders of McGrath, and gave McGrath power to cause his dismissal at his pleasure, and also directed McGrath to take plaintiff from the coal mine to Cheyenne Wells on the day of the accident, then I hold as a matter of law that in respect to the removal from the one place to the other, and with respect to the time and manner of such removal, McGrath was the superior, and stood towards plaintiff in the relation of vico-principal, or in place of the company.

You are, then, to consider, in the light of the evidence and of these instructions: *First*, whether the company authorized McGrath to use the push car for the purpose named, and his authority may be shown by proof that such use was in accordance with an established custom of the company, as above explained, but is not shown in this case, unless you find such custom has been proved; *second*, if you find that such authority is proved, you will proceed to inquire whether the order given by McGrath to plaintiff, in pursuance of such authority, required the latter to incur unusual danger, resulting in his injury; and *third*, whether plaintiff was guilty of contributory negligence, or was injured by reason of the negligence of a fellow-servant, within the rule I have laid down.

If you find for the plaintiff upon these questions, you will then come to the question of his damages, in considering which you will take into account the nature and extent of his injuries, whether they are permanent or not, to what extent he is deprived of earning a living by the pursuit of his

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usual occupation or otherwise, as well as his pain and suffering, loss of time, and expenses of medical treatment and nursing. From all the facts and circumstances as developed before you in the evidence, you will, if your verdict is for plaintiff, assess his damages at such reasonable sum as in your judgment will compensate him for his injuries.

If you find for the defendant, you will simply say so by your verdict.

UNITED STATES v. OWENS.

(Eastern District of Missouri. July, 1833.)

1. **INDICTMENT—SENDING LETTER THROUGH THE MAIL TO CREDITOR WITH INTENT TO DEFRAUD**—R. S. § 5480.—An attempt to defraud a creditor by inclosing with a letter to him worthless slips of paper in place of money, stated by such letter to be inclosed therewith, and sending such letter and inclosed slips to such creditor through the mail, is not an indictable offense under section 5430 of the Revised Statutes.

Motion to quash indictment on the ground that it does not set out any offense under the statute.

The indictment charges that the defendant, being indebted to the Bowman Distilling Company, “devised a certain scheme and artifice to defraud by means of certain slips of paper, to be inclosed in a certain letter with a certain coin known as a half-dollar, which said slips of paper were then and there to be inclosed as aforesaid in the place of a certain sum of money, to wit, the sum of \$162; and which said scheme and artifice was then and there intended by the said Owens to be effected by opening correspondence and communication with the said corporation by means of the post-office department of the United States,—did, in and for executing and attempting to execute the said scheme and artifice, then and there place in a certain postoffice of the United States, to wit, the postoffice at Alton, . . . a

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certain letter, then and there having inclosed therein the said slips of paper and the said coin, and then and there addressed to the said Bowman Distilling Company."

The letter is set forth in the opinion.

The section of the statute alleged to have been violated is as follows:

"Sec. 5480. If any person, having devised or intending to devise any scheme or artifice to defraud or be effected by either opening or intending to open correspondence or communication with any other person . . . by means of the postoffice establishment of the United States, . . . shall, in and for executing such scheme or artifice, or attempting so to do, place any letter . . . in any postoffice of the United States, . . . such person so misusing the postoffice establishment shall be punished by a fine . . ."

William H. Bliss, for the United States.

Franklin Ferriss, for defendant.

TREAT, *District Judge*.—An indictment was found against defendant under section 5480, Revised Statutes. A motion to quash has been interposed. The questions presented call for an interpretation of said section and the sufficiency of the averments made. Substantially, the indictment charges that the defendant, being a debtor of the Bowman Distilling Company for \$162.50, remitted to the latter, through the mail, a fifty-cent coin, with certain slips of paper (their character and value not stated), the letter inclosing the same being as follows:

"ALTON, Mo., February 21, 1883.

"*Bowman Distilling Company*—GENTS: Please inclosed find \$162.50, being the whole amount due you from us, for which you will please place to our credit and forward the receipt for the same, and oblige yours, truly,

"A. B. OWENS & Co."

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It is averred that defendant, within the meaning of said section, opened a correspondence with said creditor to defraud him by the means aforesaid. It is obvious, so far as the indictment discloses, that the fraudulent scheme could not be effective. The debt would not be discharged by the receipt of worthless slips of paper, nor even by the giving of a receipt obtained by fraud. If the design was to obtain credit for \$162.50 and a receipt through the carelessness of the creditor, does the transaction fall within said section? No one was defrauded, and no one could possibly be. There may have been an attempt to cheat, cognizable, possibly, by some state statutes or a common law. Were the postal laws designed to draw within federal jurisdiction each and every individual transaction between debtor and creditor, when postal correspondence ensues, with respect thereto, irrespective of the possibilities of effecting a fraud, if any were designed? Remittances may be made which may or may not be received in discharge of a debt, and may or may not be of the value stated. If the creditor chooses to receive such remittances—may be drafts, etc.—in payment of his demand, and it should turn out, after litigation, that such remittances were valueless, and forwarded with the knowledge of the debtor that they were of no value, is resort to be had to the postal laws for the ascertainment of such facts and the punishment of the offender? If such is the scope of the section named, it may draw within federal cognizance nearly all the commercial correspondence of the country as to disputed demands and the value of remittances.

It appears to the court that the act was designed to strike at common schemes of fraud, whereby through the post-office circulars, etc., are distributed, generally to entrap and defraud the unwary, and not the supervision of commercial correspondence solely between a debtor and creditor. This seems to be the true interpretation from the language in the last clause in the section, viz.:

“The indictment, information, or complaint may severally

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charge offenses to the number of three, when committed within the same six calendar months; but the court thereupon shall give a single sentence, and shall apportion the punishment especially to the degree in which the abuse of the postoffice establishment enters as an instrument into such fraudulent scheme and device."

The court, on this motion, looks solely to the charge as made in the indictment, without holding that no case of private correspondence between debtor and creditor can, under any circumstances, fall within the statute. It was hinted in argument that certain devices were resorted to, in connection with a registered letter, for the purpose of inducing the creditor to believe that the remittance had been tampered with and abstracted while in the postoffice, and that at the trial facts to that effect would appear. If such are the facts, the indictment does not disclose them. It must suffice that averments made do not bring the defendant within the statute. Whether the fact *dehors* the record may justify a new indictment, it is for the pleader to determine. The motion is sustained.

WHITE, Agent, v. CROW and others.

(District of Colorado. June, 1883.)

1. CORPORATION — CONFESSION OF JUDGMENT — COLLATERAL ATTACK.— Upon a confession of judgment by a corporation, the court in which the action is pending must, of necessity, judge of the authority of any natural person who may appear for the company in that behalf, whether it be an attorney at law or an agent of the company, and its judgment as to the right and authority of the person so appearing to bind the corporation must be conclusive in all other proceedings where the same judgment is drawn in question and not open to collateral attack.
2. JURISDICTION OF CIRCUIT COURT — RESTRAINING PROCEEDING IN STATE COURT.— A bill to restrain the sheriff of a county in the execution of process of a county court of co-ordinate jurisdiction with

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the circuit court of the United States, or to restrain the execution of a deed in pursuance of a sale under such execution, cannot be maintained in the circuit court; but when the parties to whom such deed would go are before the court, the court may deal with them and dismiss the bill as to the sheriff.

3. **SAME — SETTING ASIDE SALE.**—The circuit court has not jurisdiction to set aside a sale made in the court of the state, with a view of ordering another sale, because the sale was not made pursuant to the statute, and the party claiming such sale to be void must proceed in the state court.
4. **SAME — RIGHT TO REDEEM — PAYMENT OF PART OF CLAIM — REFUNDING MONEY PAID.**—Where a party owning an interest in the property of a corporation that has been sold under execution and purchased by several parties constituting a pool, has, with a view to redeeming such property, paid to such parties a portion of the claims against the company, they cannot, while retaining the amounts so paid, deny the right of such party to redeem, on the ground that the time allowed by the statute for redemption has expired; and unless within a reasonable time they refund the money so paid, a decree allowing redemption or payment of the balance of the claims will be passed.

HALLETT, District Judge (orally).—In the year 1881 the Brittenstein Mining Company owned six or eight mining claims in the county of Chaffee. In the course of its operations it had incurred debts which it was unable to pay, amounting in all to \$5,000 or \$6,000; and early in the following year, 1882, these claims were put into judgments by the parties who held them. There were five of these judgments, and upon three of them sales were made of the property of the company during the month of June, 1882. The delay in execution of the judgments was procured by the officers of the company through some negotiations carried on with a view to the settlement of the demands. One of these judgments was obtained by Joseph R. Crow, upon a claim assigned to him by John B. Henslee, who was a stockholder in the Brittenstein Company, and the agent of the company in this state to receive service, appointed by the company pursuant to the statute of the state. He at one time had something to do with the management of the com-

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pany, but at the time that he assigned his demand to Crow, and at the time judgment was entered on that demand, he had no official connection with the company, but was in correspondence with its officers, residing in New York, in respect to the settlement of these claims. He assigned his demand against the company on the first day of January, 1880, or about that time, and on the ninth day of that month Crow brought suit, and served his process upon Henslee as the agent of the company in this state. Four days later, on the thirteenth of January, Henslee appeared in the county court of Lake county, in which the suit was brought, and confessed judgment in favor of Crow against the company for the demand, amounting to \$1,794.33. No execution was issued upon this judgment, or upon the other judgments, until some time in the month of June following, or, if executions were issued, no sale was made until that time. I have not inquired as to the date of executions. The time for the redemption of the property expired in December of the same year. Proceedings were had in a court of the state of New York, upon which the property of the company was sold by a receiver to Mr. John D. White, plaintiff in the bill in equity, on which a decree is now to be entered. Mr. White was also a stockholder in the Brittenstein Company; he was at one time its president. At the time of these transactions he was a director of the company, and at the time of these proceedings in the court of New York also; and if the company was still in existence—of which I am not advised—after the sale of the property, he was still a director. In December following, as a purchaser of the property, he telegraphed to Mr. Smith, an attorney residing at Denver,—I think on the sixth of December,—to proceed to Leadville and Buena Vista, to confer with parties there—among others Mr. Henslee—in respect to claims and demands against this property, with a view to redeem from the sales which had been made on judgments obtained against the Brittenstein Company, as I have stated. An interview took

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place between Mr. Henslee and Mr. Smith on the seventh of December, in reference to these matters, in which something was stated as to these several demands against the company, and some things, which were not stated, it was agreed might be ascertained from the records of Chaffee county at Buena Vista, to which Mr. Smith proposed to proceed for the purpose of getting full particulars in respect to matters in which he was acting for Mr. White. Among other matters discussed at that time was a demand on the part of Henslee against the Brittenstein Company, and Mr. White, as the successor of that company, for annual work done on the claims of the company during the years 1881 and 1882. Henslee represented that some of this work had been done, and some of it was still in progress; he expected to have evidence of its completion in a day or two to present to Mr. Smith, and if the property was to be redeemed he desired to have the money so expended refunded to him.

At this point it may be proper to state, also, that while Mr. Henslee had been corresponding with the officers of the Brittenstein Company, in New York, and with Mr. White, plaintiff in this suit, to some extent as to the settlement of these claims, he had also been acting for certain parties in St. Louis and Leadville — five or six of them — called in the evidence the Western Pool. These parties, some of them, — all, I believe, but one, — had been stockholders in the company, and had agreed together to unite in the purchase of the several claims against the company with a view to secure the property; to protect the interest which they had in the company; to protect themselves in respect to moneys which they had expended in behalf of the company, and so on. It seems to have been thought desirable on the part of all persons who were connected with these affairs to get this property; the property was much more valuable than the demand against it, and any one who should secure it would be able to realize something in addition to the claims which were made against it. With that view these parties — Noel,

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of St. Louis, and Loker and Simmons — I don't know who all — had appointed Mr. Henslee to communicate with the owners of these claims and purchase them, and he had done so. He assumed to act and did act for them in the settlement of these claims, so far as they could be settled. He did not deny Mr. Smith's right, or Mr. White's right, to redeem the property at the time, and in the manner provided by law, nor conceal his connection with the parties for whom he was acting. It seems to have been contended by counsel for plaintiff that his position in attempting to act for parties in New York, and at the same time for these other parties, was of doubtful character; but I do not discover anything in the evidence to impute wrong to him, or any effort on his part to conceal his relations with this Western Pcol, or the circumstance that he was endeavoring to secure the property for them. Thus matters stood about the seventh of December. The time for redeeming under one of the judgments would expire on the tenth, under another on the seventeenth, and under another, I believe, on the twenty-fourth, of December. Mr. Smith, as the agent of White, redeemed from all the judgments but one. He went further and paid off some judgments upon which no sales had been made. He went still further and paid the money which was due for annual work,—some of it due to Mr. Henslee, having been advanced by him, other portions to parties who had done the work. From the judgment in favor of Crow he declined to redeem, from some notion that that judgment was void in itself, or so far irregular that Mr. White was not bound to recognize it, upon the ground, I suppose, that Mr. Henslee, having owned this claim at one time, his assignment to Crow was collusive, without consideration, done with intent to put the matter in judgment under process served upon him as agent of the company, and without the knowledge of the officers of the company; and upon the ground, also, that this judgment was entered within four days after the service of process upon Henslee, and by his

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confession, he not having authority to act for the company in that behalf. That, I believe, is in substance the position assumed by counsel here, and this bill was filed to redcom from this judgment upon some such theory as that.

We are unable to recognize the force of these suggestions. While it may be true that Henslee was without authority, and as agent of the company, appointed to receive service of process, he would not have power under the statute to confess judgment in favor of any one and bind the company in that way, the judgment, therefore, was irregular, perhaps subject to reversal, on that account; yet we do not think it is open to collateral attack. Upon a confession of judgment by a corporation the court in which the action is pending must of necessity judge of the authority of any natural person who may appear for the company in that behalf, whether it be an attorney at law or an agent of the company, and its judgment as to the right and authority of the person so appearing to bind the corporation must be conclusive in all other proceedings where the same judgment is drawn in question. What the force and effect of such a confession shall be in any regular proceeding to vacate it, and in any court of review to which it may be carried, is not for us to say. We think that the judgment of the county court, entered upon Mr. Henslee's confession, must be taken to be valid and binding upon the company. It is in evidence that the claim was a valid one; the amount for which judgment was given was due from the company to Henslee; he assigned upon good consideration to Crow. His right to assign cannot be denied; and if there be any infirmity in the matter in respect to his right and authority to appear for the company and confess judgment in its behalf, that is a matter which can only be inquired of upon some proceeding to vacate and set aside the judgment.

In respect to the particular circumstances of this case, it is in evidence that some of the officers—certainly the vice-president, in particular—knew of the entry of this judg-

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ment very soon after it was entered, and long before any sale was made under it. Mr. White, the purchaser of the property, and the plaintiff in this suit, knew something of it long before he became a purchaser of the property, and no step was taken by the company itself to attack the judgment and set it aside in the court in which it was rendered, or to remove the record into the supreme court of the state, with a view to make inquiry there concerning it. So that we are prepared to say that in this proceeding, and so far as the right of Mr. White to redeem from it is concerned, that no question can be raised in respect to its validity. And the failure of Mr. White to redeem from it within the time prescribed by statute was one which probably may affect his interest very materially in respect to this property. We do not see that he offers any valid excuse for failure to do so. Mr. Smith was informed of the existence of this judgment, and of the time the sale was made, ten days before the expiration of the time for redemption. Of course, it was in his discretion to act, or decline to act, as he thought best. It is to be said further, relative to this matter, that this bill was filed against the judgment creditors and the sheriff of the county to enjoin further proceedings under that judgment.

In so far as it is proposed by the bill to restrain the sheriff of the county in the execution of process of a court of Lake county, it cannot be maintained in this court. In that respect it is a bill to restrain proceedings in a court of co-ordinate jurisdiction, and as such we have no greater authority in respect to the execution of a deed in pursuance of the sale than we have in respect to the sale under the execution in the first instance; and so, by the express language of the statute of the United States,—I do not recall the number of the section,—we are forbidden to interfere with the conduct of the sheriff in respect to that matter. But, having the parties before us to whom the deed would go, we conceive we have a right to deal with them and to dismiss

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the bill as to the sheriff. The parties, whose ultimate right it is to have this property, are before the court. It appears that these purchasers of the various judgment claims from the execution creditors, Crow and Evans, and more of them, are before the court. They came in voluntarily. The members of the Western Pool made defense in their own name, becoming parties to this bill. Having them before the court, we have a right to deal with them directly in respect to this matter, and without reference to the sheriff, and to proceed against them as we would proceed against the sheriff, if it were competent for us to entertain jurisdiction as to him. This, I suppose, determines everything that can be said in reference to this matter except one. As already stated, these parties, constituting the Western Pool, bought up all these claims against the company. The amount in all is something over \$5,000—between five and six thousand. They had also a claim for annual work done in the year 1882, and they allowed Mr. White, plaintiff in this suit, upon the theory and proposal to redeem from all these demands, and acquire the property for himself, to pay a good part of these demands,—something over \$3,000,—four of the judgments, and for the annual work.

In our view, and we think it should so be regarded in any court of equity, these demands, held by one party and for one purpose, should be regarded substantially as one thing, and one accepting payment of any part of them cannot deny Mr. White's right to pay the remainder without refunding what he had received from him. It is not competent for them to say, we will take part of the money in payment of these demands and keep it, because you have failed in respect to one, under some mistake of fact or law. We will hold on to this and deny your right to redeem, and keep the property also. We think that would be most inequitable and unjust, and therefore we propose to say to these defendants that they must refund the money, or admit the plaintiff's right to redeem this property. The decree will be that,

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within thirty days from the date of entering the decree, the defendants refund the money received in partial payment of the several demands against this property, with interest; or, failing in that, that the plaintiff be allowed to pay the remainder and to have a deed from these parties of such interest as they may have acquired or may acquire under these several sales. As to the sheriff the bill will be dismissed.

There is a point which I intend to advert to in the course of discussion, to which I may allude now. In respect to the sale of the property *en masse*, it is alleged in this bill, and not very well denied, that this property was sold in bulk — six or eight claims, whatever their number may be — as one claim, and upon that the plaintiff contended, as it is decided in some states, the sale was void, or, as held in others, it was voidable, and he would have the right to replevy. We do not think it can be regarded as a void sale, and if it be voidable the right can only be asserted in a court of the state. We have not jurisdiction in this court to set aside a sale made in a court of the state, with a view of ordering another sale, the sale not having been made pursuant to the statute. That portion of the bill, therefore, should be dismissed, without prejudice to the right of the plaintiff to maintain another bill for the same cause in any court of competent jurisdiction.

I believe that covers the whole ground.

It is pretty clear to us that plaintiff has no other right than to have this money back, with interest. We are not disposed to maintain his possession by injunction.

If the defendants here get legal title from the sheriff they can assert that title in an action at law; we are not disposed to interfere in a suit of that kind.

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McCONVILLE v. HOWELL and others.

(District of Colorado. June, 1883.)

1. NON-RESIDENT ALIENS.— Under the statute of Colorado non-resident aliens may own, inherit and convey property, real or personal, the same as citizens and residents.
2. CONTRACT OF SALE — SPECIFIC PERFORMANCE.— A contract for the purchase and sale of an interest in mining property at a price named therein, in which contract is the following clause: "Provided, always, in the event of such failure to complete such purchase, he (the purchaser), his heirs and assigns, upon the delivery of possession of said lands and mining premises as aforesaid to the parties of the first part, their heirs and assigns, shall in nowise be held responsible for the payment of said purchase money." *Held*, that upon refusal to redeliver the property to the sellers on demand, the latter had the right to treat the contract as a sale, and proceed to enforce its specific performance in equity.

In equity.

McCRARY, *Circuit Judge (orally)*.— In the case of *Edward McConville v. C. C. Howell et al.*, I have reached certain conclusions, which I am prepared now to state. It is a bill in equity, brought for the purpose of obtaining a decree for the specific performance of a written contract whereby these complainants agreed to sell to the defendant Howell, and the defendant Howell agreed to purchase, certain interests in mining property situated in Lake county, in this state. It is alleged that the complainants are the heirs at law of one John McConville, who died at Leadville some time in November, 1880. Some discussion has been had as to whether the proof in this case is sufficient to establish the heirship. Some of the statements given by the principal witness, Mr. Burne, are in the nature of family history, and, to some extent, hearsay; but they probably fall within the very liberal rule which prevails upon that subject. Whether they do or not, I am prepared to say that, in this particular case, the court is satisfied with the proof. We should not apply a very

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strict rule in a case of this character, for it must be borne in mind that Howell, the defendant, who was the purchaser of this property, was the administrator of the estate of John McConville, deceased, and he dealt with these plaintiffs as the heirs of John McConville, and bought the property from them as such heirs. He must be presumed to have known who the heirs were. It was his duty to ascertain that fact. He was the trustee for them, and if they had chosen to repudiate the contract upon the ground that he acted as their trustee, they could in all probability have done so, upon the doctrine that the executor has no right to purchase the property of the heir while he is acting in that capacity. They have not seen fit to do that, and I mention it merely to show that the court ought not to adopt a very strict rule in reference to proof of heirship. I hold, therefore, that the proof is sufficient to show the heirship of these complainants.

In the second place, it is established that the said John McConville was, at the time of his death, the owner of an undivided interest in the several mining claims mentioned in the bill. Precisely what his interest was, it is not material here to consider, but that he had an undivided interest is well established.

In the third place, the complainants, though non-resident aliens, were capable of inheriting property in this state by virtue of the statute of the state upon this subject. The complainants, it appears, are non-resident aliens, and it is insisted that for that reason they were incapable of inheriting any interest in this property from John McConville, and consequently had nothing which they could sell. It is said that the result is that there is no consideration for this contract. But the statute of this state upon that subject is very explicit. Chapter 4, p. 90, Gen. Laws Colo. § 15, provides:

“All aliens may take, by deed, will, or otherwise, lands and tenements and any interest therein, and alienate, sell and transmit the same to their heirs or any other persons,

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whether such heirs or other persons be citizens of the United States or not; and upon the decease of any alien having title to or interest in any lands or tenements, such lands and tenements shall pass and descend in the same manner as if such alien were a citizen of the United States; and it shall be no objection to any person having an interest in such estate that they are not citizens of the United States; but all such persons shall have the same rights and remedies, and in all things be placed upon the same footing, as natural-born citizens of the United States. The personal estate of an alien, dying intestate, who, at the time of his death, shall reside in this state, shall be distributed in the same manner as the estate of natural-born citizens; and all persons shall be entitled to their proper distributive shares of such estate under the laws of this state, whether they are aliens or not."

It is conceded, as of course it could not be questioned, that the statute is broad enough to include this case; but it is suggested that it is not constitutional. The provision of the constitution referred to is section 27 of article 2, which reads as follows:

"Aliens, who are or who may hereafter become *bona fide* residents of this state, may acquire, inherit, possess, enjoy and dispose of property, real and personal, as native-born citizens."

And the argument is that the necessary purport of this provision of the constitution is to limit the right to possess, inherit or enjoy property to aliens who are or may hereafter become citizens; in other words, that it prohibits the legislature from extending the right to non-resident aliens. I do not agree to that construction of the constitution. The very same question was decided by the supreme court of California, and, I think, upon very sound reasoning, in the case of *State v. Rogers*, 13 Cal. 159. The constitutional provision, and also the statutory provision, in California,

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were substantially like those in Colorado, and the points decided in this case were these:

"The constitution is not a grant of power, or an enabling act, to the legislature. It is a limitation on the general powers of a legislative character, and restrains only so far as the restriction appears, either by express terms or by necessary inference.

"The act of April 19, 1856, permitting non-resident aliens to inherit real and personal estate, is constitutional. The constitution (article 1, § 17) [which corresponds to the section of the Colorado constitution I have just read] gives the *bona fide* resident alien certain rights, which may be enlarged, but cannot be abridged, by the legislature."

That I understand to be a sound rule; the rights guaranteed by the constitution cannot be taken away, but other rights may be given to the same or to other persons. The legislature may go further in the conferring of these rights upon aliens, but they cannot do less than that which the constitution requires.

It appears that the complainants, through their lawfully authorized agent, and the defendant, C. C. Howell, entered into the contract set out in the bill, whereby the defendant agreed to buy the interest in the said mining claims. In my opinion, the said contract was not a mere option to buy on the part of Howell, from which he could withdraw at pleasure, without restoring to complainants the possession of the property and of all rights as they existed before the execution of the contract. Here arises a question of a good deal of importance in the case. It depends upon the construction of the contract between the parties; it is a very voluminous contract; I shall not undertake to read it. It is, in substance, a contract whereby these heirs agreed to sell this mining property to Howell. Howell agreed to spend \$25,000 within a year in developing the mines, and agreed to pay \$33,000 as a consideration for the conveyance.

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at the end of the year. There were other provisions, which need not be referred to. The one relied upon by the defendant, as constituting this contract a mere option, is as follows:

“Provided always, in the event of such failure to complete such purchase, he [that is, Howell], his heirs and assigns, upon the delivery of possession of said lands and mining premises as aforesaid to the parties of the first part, their heirs and assigns, shall in nowise be held responsible for the payment of said purchase money.”

There is an unequivocal promise in this agreement on the part of Howell to pay the \$33,000 within the year, but this clause is added, whereby, as it appears to me, he was given an election to discharge the obligation by a redelivery of the property to the heirs before the end of the year. I suppose that, like many of these transactions, the value of the property was somewhat problematical, and would depend upon development and investigation, and so Mr. Howell desired to reserve the right or privilege of an option, in case it turned out to be of less value than supposed, to redeliver the property, and thereby discharge himself from liability for the purchase money. But he failed and refused to redeliver the possession to these complainants. They demanded possession and were refused. In my judgment the option was at an end; the right of Mr. Howell, which he had reserved by this clause of the agreement, was no longer available to him after his refusal to avail himself of it when the demand was made, and thereupon the grantors in the contract had a right to treat it as a sale and proceed in equity for the purpose of obtaining a specific performance.

I do not overlook the question, which has been discussed a good deal by counsel, as to whether this is a case within the equity jurisdiction of the court; in other words, as to whether there is a plain, speedy and adequate remedy at law. That depends, perhaps, upon the question whether the

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vendor here is entitled to a lien upon the property for the purchase money. Undoubtedly he would not have been if Mr. Howell had redelivered the property to him in accordance with the terms of the contract; but since Mr. Howell declined to do that, and chose to retain the possession, and still retains it, and appears to be in the enjoyment of the property, and engaged in its development and use, I have no doubt that the contract becomes, in substance, a bond for a deed, or contract for the purchase of real estate, which gives the vendor a lien for his purchase money, which he may proceed in equity to enforce. It is true, there is a conflict of authority upon the question whether a party, under such circumstances, may come into a court of equity, or whether he is obliged simply to proceed at law. This question, however, is set at rest, so far as this court is concerned, by the decision of the supreme court of the United States in *Lewis v. Harvins*, 23 Wall. 119. That was a case of a vendor who gave a simple contract to convey. There was no conveyance. He went into a court of equity to enforce the specific performance of the contract, and to claim a lien upon the property. The argument for defendants in that case, by very distinguished counsel, was precisely the same that has been made here. They said: "The estate in fee being in Lewis [that is, the vendor], how can he have a lien? The man cannot have a lien on that which is his own." But the court answered it: "The seller, under such circumstances, has a vendor's lien, which is certainly not impaired by withholding the conveyance. The equitable interest of the vendee is alienable, descendible and divisible, in like manner as real estate held by legal title." And so they maintained the jurisdiction in equity to enforce the performance of the contract and to enforce a lien upon the property, on the ground that, although there was no formal conveyance by the vendor to the vendee, by the contract to convey there was an equitable estate vested in the vendee, which he could sell and dispose of, and the other party had a right to

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treat it as a sale, and proceed to enforce his vendor's lien upon the property.

I think in this case that the complainants are entitled to a decree requiring the payment of the purchase money upon their tendering a deed to Mr. Howell, and for the enforcement of the decree, if necessary, by the sale of the premises.

N. F. Cleary and G. G. Symes, for plaintiff.

George, Maxwell & Phelps and Markham, Patterson & Thomas, for defendants.

UNITED STATES v. MARSHALL SILVER MINING CO.

(*District of Colorado. June, 1883.*)

1. PATENT FOR LANDS—CONSPIRACY AND FRAUD IN PROCURING.—A bill which charges a conspiracy between defendants and officers of the land department of the government, with a view to perpetrate a fraud upon the government and other persons, *held* good on demurrer. *Quære*: To what extent must injury to the government be shown as a basis of relief? Is it enough to show that the patent was obtained in violation of law?

On demurrer to bill.

McCRARY, *Circuit Judge (orally)*.—In the case of the United States against the Marshall Silver Mining Company and others I have considered the demurrer to the bill. The bill charges, at very considerable length, a conspiracy between defendants and certain land officers to change the boundaries of a claim for a patent, and to do this fraudulently, for the purpose of extending one claim over the lines of another, and thus secure a patent to the defendant here, the Marshall Silver Mining Company, for certain mining property which was in equity the property of

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McClellan, Webster and Rist, who also had their application pending. Numerous acts and several rulings of the land officers are charged specifically in the bill as having been wrongful and fraudulent; as having been done and made in pursuance of the general conspiracy to perpetrate a fraud upon the United States, and also upon McClellan, Webster and Rist. I will not take the time to repeat the allegations of the bill, or to go into any discussion upon them. It is sufficient for the present to say that, in my judgment, it charges conspiracy and fraud with sufficient certainty to require an answer. Whether the facts, when fully developed, will show a fraud upon the United States, or only upon McClellan and Webster, or whether it will show a fraud upon both, are questions we can better determine upon the proofs and on final hearing. They are questions of some importance, perhaps of some difficulty. It is probably not entirely settled as to how far, or to what extent, an injury to the government must be shown, as the basis of relief in a case of this character. It may be that it is enough to show that the patent was obtained in violation of the law; possibly it may be necessary to show some actual damage; but these questions may be better determined upon the final hearing of this case than they can be now upon this demurrer, and I do not propose to pass upon them any further than I have already indicated.

The demurrer to the bill is overruled.

A. W. Brazee, District Attorney, for the United States.

Morrison & Fillius, for defendants.

SIMPSON v. LA PLATA MINING & SMELTING CO.

SIMPSON v. LA PLATA MINING & SMELTING CO.

(District of Colorado. July, 1883.)

1. NEGLIGENCE—PERSONAL INJURY TO MINER.—A complaint in an action to recover damages for personal injuries caused by the negligence of an employer to an employee should clearly state facts sufficient to make it appear to the court what the act of negligence that caused the injury was.

At law.

HALLETT, *District Judge (orally)*.—In the case of William Simpson against the La Plata Mining & Smelting Company, an action to recover damages for injuries received while in the service of the company, the plaintiff avers that the defendant, through its superintendent, brought into the smelting-house certain tanks or jackets, and stacked them up, or placed them on end, near where the plaintiff was required to pass, in the performance of his usual duties, in wheeling out slag, and that while he was passing these tanks some one of them fell upon him and injured him. He has not described with particularity the position of the tanks, and what neglect there was in the superintendent in placing them where they were. He states briefly that the tanks were placed there, and that one of them fell upon him. I think that he should give in detail the position of the tanks, so that it may be seen what the act of negligence was on the part of the superintendent; how the tanks were placed, as evincing carelessness in the superintendent; and in what way they were left so as to be a source of danger to those who should pass by them. Certainly it is not enough to aver that the tanks were put there, and that one of them fell down. It may have been some extraordinary circumstance that caused the falling. If they were so placed that it might be reasonably expected they would topple over, he ought to state that fact—describe the position so clearly

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that we may see from the complaint that the superintendent was careless in leaving them in the way in which they were left.

Demurrer to complaint sustained, with leave to plaintiff to amend in thirty days.

D. J. Haynes, for plaintiff.

Markham, Patterson & Thomas, for defendant.

MANVILLE v. BATTLE MOUNTAIN SMELTING CO.

(*District of Colorado. June, 1883.*)

1. PRACTICE — FORM OF PROCESS — CONSTITUTIONAL PROVISION NOT FOLLOWED BY STATUTE. — The legislature of a state may prescribe the form of process, but in so doing the provisions of the constitution must be observed; and where the constitution provides that every summons shall run in the name of the people, a summons in the form given in the statute, but not in the name of the people, is deficient.
2. SAME — SUMMONS RETURNABLE — GARNISHMENT. — A garnishee in Colorado is entitled to ten days in which to appear and answer, "as in other summons in courts of record;" and when the summons is made returnable *within* ten days from the date of service it is a fatal defect.

HALLETT, *District Judge (orally)*. — Manville recovered a judgment against the Battle Mountain Company in the district court of Lake county, and took out execution, and procured the Belden Mining Company to be summoned as garnishee. That company entered a motion to quash the summons and the return of the sheriff thereon, and removed the cause into this court. The motion has been presented here.

Objection is made that the summons does not run in the name of the people, as required by the constitution of the

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state, article 6, § 30. And the objection seems to be well taken. Unquestionably the legislature may prescribe the form of process, but in doing so the provisions of the constitution must be observed. This process appears to be in the form given in the statute (2 Sess. 1879), but it is deficient in that it does not run in the name of the people, as required by the constitution. That it is not in the form of other process used in law actions is not important, and the circumstance that it was issued by the sheriff, rather than the clerk, is not important. In these particulars the authority of the legislature cannot be denied; but the constitution cannot be disregarded.

The statute also provides that, in courts of record, "the summons shall be made returnable and be served the same as other summonses in courts of record;" and this seems to require that the time for answering shall be the same as in actions at law. In this instance the summons was made returnable within ten days from the date of service. This is a fatal defect. The garnishee was entitled to ten days in which to appear and answer, and, if service was not made in the county where the judgment remained, then to a longer time.

The motion will be allowed and the cause dismissed.

M. Campbell, for plaintiff.

H. T. Rogers, for garnishee.

FOSTER v. OHIO-COLORADO REDUCTION & MINING CO.

(District of Colorado. June, 1883.)

1. NOTE OF CORPORATION — WHO MAY EXECUTE. — The authority of an officer of a corporation to execute its note depends upon the by-laws, or upon the custom of the corporation. If it be the custom of a corporation to permit the treasurer to execute its promissory

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notes, the corporation will be bound by such note; especially if it received the benefit of the money for which it was executed.

2. EVIDENCE — WEIGHT OF.— When there are written evidences made by the parties at the time the transactions occurred, these are entitled to more weight than contrary statements made subsequently, and after a litigation has sprung up. The jury are to judge of the evidence.

At law.

MCCRARY, *Circuit Judge (charging jury)*.— This is largely a case to be determined upon questions of fact. Such questions are exclusively for the consideration of the jury. The province of the court is only to call your attention to the principles of law by which you are to be guided in the application of testimony.

The plaintiff, Mrs. Susan Foster, sues the defendant, the Ohio-Colorado Reduction & Mining Company, a corporation, and she alleges that company is indebted to her upon a promissory note for \$10,500. The defense is twofold: *First*, that this is not the note of this defendant corporation; and *second*, that there was no valid subsisting debt from the corporation to Mrs. Foster at the time the note was given, and for which it was given.

These, then, gentlemen, are the two matters for you to consider.

Upon the first question, as to whether this is the note of the defendant corporation, that depends upon the question whether the person who executed the note on behalf of the corporation, Mr. Penn, the treasurer of the company, was authorized to execute such an instrument. The law upon this subject is that the authority is not presumed from the mere fact that the person assumed the right to give a note in the name of the corporation. A corporation is an artificial person, which must act within certain limits. It differs from a natural person. If an individual gives his note, it is not necessary to prove anything in the way of authority, but a corporation must act by way of agents, and the authority of

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the agent who acts for it is not presumed. It may, however, be shown, either by showing an express authority,—as, for example, a resolution of the board of trustees authorizing a certain party to execute a note on behalf of the corporation,—or by a provision of the constitution or by-laws of the corporation authorizing a certain officer to execute promissory notes. It might be shown in that way; but I believe it is not claimed that there is anything of this kind here. It may also be shown by the course of dealings of the corporation, and by facts and circumstances which are sufficient, in the judgment of the jury, to show that the party who executed the note had the authority. If it was the custom of this corporation to permit the treasurer to execute its promissory notes, and if he was in the habit of doing so, with the knowledge of the trustees, or of the corporation,—which means, of course, the trustees,—they had, by recognizing that custom, and acting upon it, themselves become bound by it, and especially if they received the benefits of transactions of this sort, which they permitted the treasurer to enter into. It is only, therefore, necessary for you, in considering this branch of the defense, to inquire whether the evidence here establishes the fact that Mr. Penn, the treasurer, was in the habit of acting for and on behalf of the corporation in executing promissory notes and other instruments of like character, and whether the corporation was aware of that fact, and made no objection to it. If you find this to be so, then you will come to the conclusion that the note was executed by the corporation, and you will proceed, then, to the other question; that is, whether the corporation was indebted to Mrs. Foster in the amount of money for which this note was given. Upon that question there is a great deal of testimony, and I do not know that I can say much which will aid you in its elucidation. It is to be determined upon all the circumstances developed before you in evidence. In looking into it, you will have to consider what has been testified here upon the stand, and what has been

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testified by the witnesses whose depositions have been taken.

You will have to look into such documentary evidence as is before you; as, for example, the books of the corporation and the correspondence which is in evidence — the letters; and it is not improper for me to say that the letters that are written by a business man, in the course of a business transaction, at the time that the events are transpiring, if they bear upon the question that you have to consider, are often very satisfactory evidence — much more satisfactory than the statements of parties after they have come into conflict and after a controversy has arisen and they have become biased and heated and excited by that controversy. If you can go back to the time when the transactions were going on — when there was no difficulty between the parties — and if you can find either in the records they kept or letters they wrote anything that bears directly upon the question in controversy, you are authorized to give a good deal of weight to anything of that kind; and therefore you will look into the letters which are in evidence and see how far they corroborate the statements of Mr. Penn upon the stand. If they corroborate them — if there is nothing in them in conflict with his statements here — they may be taken as important in the support of the claim of this plaintiff; but if, at the time these transactions were transpiring, he made any statements in this correspondence which contradict the claim of the plaintiff here and now, or contradict Mr. Penn's statement upon the stand, that would throw some suspicion upon that much of his testimony. I do not say to you, gentlemen, whether there is anything in these letters that contradicts Mr. Penn or anything that confirms or corroborates him. That is for you to say. I only say that the contemporaneous writings are often very satisfactory where there is conflict of testimony such as you have here. Here are these books; you take them and examine them for what they are worth. If they do not purport to be a record of such transactions as

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that which is now in controversy, why, of course, they are not important; but if they do contain records of such transactions,—if they show, in other words, what moneys were borrowed by the corporation, and do not show any transactions with Mrs. Foster of this character,—it is for you to consider what weight should be given that fact. In determining the question before you you will also look at the testimony that bears on the question, how much money was raised by this corporation, and from what sources, and give the testimony such weight as it is entitled to in determining the question whether this amount of money was furnished by Mrs. Foster and put into its business or not. There is some dispute as to whether any money was furnished by Mrs. Foster. If any money was furnished, the principal controversy is as to whether it was furnished to the corporation or furnished by her to Mr. Penn to be used on his own behalf and as an advancement by her to him. If, when the corporation was in trouble, Mr. Penn went to her, induced her to loan money to the corporation, gave the note of the corporation for money that went into its business, then she ought to have judgment for the amount. If, on the other hand, Mr. Penn obtained money from her to be put into the business on his own account, and afterwards gave this note in settlement of that account, in the name of the corporation, of course, if that be the fact, the plaintiff is not entitled to recover.

These are the two theories, gentlemen, and here is all this evidence. You must take it and determine.

It appears that it is a controversy of long standing; the parties live at great distance; it is, necessarily, very expensive litigation. Therefore it is exceedingly desirable that you should go to your room in a spirit of mutual concession, to hear and receive each other's judgments and views, to arrive at a conclusion, and put an end to this controversy.

If you find for the plaintiff, your verdict will be the

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amount of this note, with interest to this date. If you find for the defendant, you will simply so say.

Verdict: "We, the jury, find the issues in this case for the defendant."

Brown & Putnam, for plaintiff.

Wells, Smith & Macon, for defendant.

ADAMS v. SPANGLER.

(*District of Colorado. June, 1883.*)

1. **NEW TRIAL.**—Motion for a new trial in a case tried before the district judge will be heard by the circuit judge only on request of the former, and not as a matter of right to the unsuccessful party.
2. **OFFICER—RESPONSIBILITY OF, IN EXECUTING PROCESS.**—The rule is that the sheriff to whom a valid process is issued is bound to exercise ordinary skill and diligence in its execution, and in case of his neglect in this regard is liable for any damages which the party interested may have sustained in consequence of such neglect.
3. **SAME—ORDINARY DILIGENCE.**—In case of an attachment placed in the hands of a sheriff to levy, it is not the exercise of ordinary diligence for the sheriff to take the representation of the defendant in attachment as to the value of goods seized thereunder. And in such case, when it appears that there were in the possession of defendant goods amply sufficient to satisfy the sum named in the attachment, and the sheriff, relying upon the representation of defendant, fails to levy upon a sufficient quantity, he will be held responsible for such failure.
4. **PEREMPTORY INSTRUCTIONS.**—The rule in federal courts is that if the court be of opinion that, upon the evidence as it is presented, a verdict one way or another would have to be set aside on motion for new trial, on the ground that it is not supported by the evidence, the court is not bound to submit the question to the jury, but may charge the jury in accordance with the view the court takes of the proof. The court is not bound to go through the form of submitting a case to the jury when satisfied in advance that in case the jury find one way the verdict will be set aside.

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5. **SAME — MEASURE OF DAMAGES.**— In such case, when it appears that the defendant in attachment is insolvent, the measure of damages will be the difference between the amount named in the attachment, with costs, and the amount realized from sale of the goods seized — the actual damage sustained.

On motion for new trial.

W. S. Decker, for plaintiff.

Wells, Smith & Macon, for defendant.

McCREARY, Circuit Judge (orally).— This case is before the court upon a motion for a new trial. The suit was brought by plaintiff against the sheriff to recover for the alleged neglect of the sheriff in making a levy by virtue of a writ of attachment sued out by the plaintiff. The allegation is that the sheriff failed to levy upon sufficient property to pay the debt. The case was tried before the district judge and a jury, and resulted in a verdict for the plaintiff. At the request of the district judge, the motion for new trial has been heard by the full bench. I mention this lest counsel might fall into the misapprehension that motions of this character are heard by the circuit judge as a matter of course. It is only when the district judge requests it that they are so heard; if it were left to counsel, every case tried before the district judge would have to be reheard.

The question in this case was, whether the sheriff was negligent. It appears that when he received this writ the defendant in the attachment was in possession of a stock of goods amply sufficient to pay the entire demand of the plaintiff. When the sheriff or his deputy went to make the levy, being himself ignorant of the value of such goods as those in the possession of the defendant, he made some effort to inform himself with respect to their value; he sent for a person who was supposed to be an expert upon the subject, and was not able to find him. Upon his failure to obtain

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the advice of this particular individual, he contented himself with such information as he was able to obtain from the defendants in the attachment themselves, and relied upon their representations, and upon the invoices of the goods which they submitted to him. The goods taken under the writ sold for something over \$200, I think, whereas the debt amounted to some \$900 or \$1,000; and in the store, it is admitted, were goods of sufficient value to have paid the entire debt.

As to the law which governs a case of this sort, there is not room for much controversy; indeed, there is no real difference between the counsel for plaintiff and the defendant. The rule is laid down by Shearman & Redfield on Negligence that a sheriff to whom a valid process is issued is bound to exercise ordinary skill and diligence in its execution, and for any neglect to exercise such skill and diligence is liable for any damages which the creditor named in the process may have in consequence sustained. In other words, what is required of the officer is the exercise of ordinary care and diligence — such care and diligence as a man of common prudence would exercise with regard to his own private affairs. He is not responsible for the use of more than ordinary diligence. Admitting this to be the rule, the difference between the counsel arises here upon the question whether, upon the evidence in this case, the court was authorized to say that the sheriff was guilty of negligence or was bound to submit the question to the jury. In view of the facts which I have stated, I think it will appear clearly enough that the sheriff did not exercise ordinary care and prudence, and that the court was authorized so to say to the jury. The rule which prevails in the federal courts upon that subject is this: If the court is of the opinion that, upon the evidence as it is presented, a verdict one way or the other by the jury — a verdict, for example, for the defendant in this case — would have to be set aside upon a motion for new trial, upon the ground that the evidence does not

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support it, in such a case the court is not bound to submit the question to the jury, but may charge the jury in accordance with the view the court takes of the proof. We are not required to go through the form of submitting a case to the jury, if we are able to say in advance that, in case the jury finds one way, the court will set aside the verdict.

Now it is laid down, in the same authority that I have quoted, that, where the debtor has sufficient property to satisfy the writ, it is negligence in the sheriff not to levy upon sufficient to satisfy the writ. In estimating the property he should use a sound discretion, and is not liable if it turns out to be insufficient. But is it the exercise of a sound discretion, is it the exercise of ordinary prudence and care, for the sheriff to submit the question to the debtor, the defendant in the attachment suit, and be governed by his opinion, and such information as he gets from him with respect to the value of the property? I think most clearly not; and as that is all, according to the testimony in this case, that the sheriff did in his endeavors to ascertain the value of the property, we are bound to say that the case falls clearly within the doctrine that I have announced, and that the evidence shows that ordinary care and prudence were not exercised; and if the jury upon such evidence had found for the sheriff, the court would have been obliged to set the verdict aside.

There is one other question in the case, and that is as to the measure of damages. The court instructed the jury that, upon the issues in this case, if they found for the plaintiff, they were bound to find for the difference between the amount of his judgment and the amount realized upon the property which was seized under the attachment; it being a conceded fact that there was sufficient property in the store at the time the levy was made, if it had been taken upon the writ, to pay the entire claim. There is in the books some conflict upon the question as to the measure of damages in such a case. In some states it is held that the plaintiff is

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prima facie entitled to recover the difference between the amount realized on the property levied upon and the amount of the judgment, with interest and costs, without showing that the defendant in the attachment and in the judgment was insolvent, and that nothing can be realized by a general execution. In other states it is held that if it appears that the money could be made by another writ, that the measure of damages is the actual damage which results from the delay, costs, etc., which will be involved in the pursuit of the remedy. It is not necessary in this case to determine which of these rules is the correct one, because we are very clearly of the opinion that, under the admissions of the answer in this case, the charge of the court was correct. The answer admits that at the time of the delivery of the writ of *fiery facias*, in the complaint mentioned, to this defendant, the said Dufur, Coffin & Co. (who were the debtors) had at said county of Arapahoe no lands, tenements, goods, chattels or effects liable to execution, save the goods, wares and merchandise so as aforesaid levied upon and taken by virtue of said writ of attachment as in the complaint mentioned.

It is suggested that this is not an admission that these defendants were insolvent, but we think it is very clearly. The terms "lands, tenements, goods, chattels and effects," cover and embrace all kinds and every character of property, and if the defendant has neither he is certainly insolvent. It is true that this allegation relates to the time when the execution was delivered to the sheriff, which, of course, was a period somewhat later than the day of the levy of the attachment; but the court will presume that if they were entirely insolvent at the time of the delivery of the execution, they were so at the time of the issue of the attachment. At all events, the allegation is sufficient to shift the burden, and to make it the duty of the defendant to show that the defendants in the attachment were solvent, and that the money could have been realized.

It follows that the motion for a new trial must be overruled.

Greenwald and others v. Appell.

GREENWALD and others v. APPELL.

(District of Colorado. June, 1883.)

1. **STATUTES OF LIMITATIONS.**—Statutes of limitations are statutes of repose, and are enacted upon the presumption that one having a well-founded claim will not delay enforcing it beyond a reasonable time if he has the power to sue. Such reasonable time is, therefore, defined and allowed. But the basis of the presumption is gone whenever the ability to resort to the court has been taken away, and in such a case the creditor has not the time within which to bring his suit that the statute contemplated he should have.
2. **SAME — BANKRUPTCY — DELAY IN APPLYING FOR DISCHARGE.**—Proceedings in bankruptcy amount to an injunction against any proceedings against the bankrupt to enforce his contracts in the courts, but if he delays for an unreasonable time to apply for his discharge, the right of action against him upon his contracts or debts, which was suspended by the commencement of proceedings in bankruptcy, revives, and during the time that the right of action was suspended by the bankruptcy proceedings the statute of limitations will not run in his favor.

McCRAEY, *Circuit Judge (orally).*—This is an action at law upon certain promissory notes, and also, I believe, upon an open account. There is a demurrer to the complaint which raises the question whether the action is barred by the statute of limitations of this state. The defendant Appell was adjudicated bankrupt in the state of Pennsylvania some years ago, and the proceedings in bankruptcy were continued for some years, and are probably still pending; but Appell has never been discharged.

The theory of this suit is that, having delayed for an unreasonable time to apply for his discharge, the right of action against him upon these debts, which was suspended by the commencement of proceedings in bankruptcy, has revived; and the question here is whether, during the time that the right of action was suspended by the bankruptcy proceedings, the statute of limitations of the state of Colorado continued to run in favor of the bankrupt; or, in other words, does the bankruptcy of the debtor suspend the run-

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ning of the statute of limitations in his favor? That it suspends the right to sue, by the very terms of the bankrupt act, is not disputed. After the commencement of proceedings in bankruptcy against the debtor, and after an adjudication in bankruptcy, no suit can be brought against him in any court; certainly not without the consent of the bankruptcy court. It amounts, in other words, to an injunction against any proceedings against the bankrupt to enforce his contracts in the courts of the country. If he is not discharged, then the action revives after the proceedings in bankruptcy are ended.

The old rule upon this subject was very strict, and many authorities have been cited which clearly hold that, if the statute of limitations begins to run, nothing will stop its running except something that is expressly provided in the statute itself; and it was formerly held that even a state of war was not sufficient; that an injunction against the creditor from bringing a suit was not sufficient to suspend the statute, and that it continued to run notwithstanding these things. That rule will be found laid down in *Angell & Ames on Limitations*, and I think in some other standard authorities. But the more modern rule is otherwise. It has been settled now, by the decisions of the supreme court of the United States, that there are certain exceptions to the statute of limitations other than those which are expressed in the statutes themselves. The old rule has been qualified by later and better rulings, especially in the supreme court of the United States. These later decisions hold that an exception may be allowed where a party is prevented by some superior law or public calamity, such as war, from bringing the suit. The cases growing out of the late rebellion are illustrations of this doctrine. Although none of the statutes of limitations had any exception which applied to the case of a debtor who was within the lines of the rebellion, and therefore beyond the reach of civil process, so he could not be sued, the supreme court in a series of cases laid down the doctrine that that was an exception

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which was created by the necessities of the case. And this exception has been established by the case of *Bailey v. Glover*, 21 Wall. 342. That is a case which arose under the bankrupt act of 1867, which has a limitation clause embodied in its second section. That clause provides that no suit at law or in equity shall in any case be maintained, etc., "unless the same shall be brought within two years from the time the cause of action accrued." That is as broad, as sweeping and comprehensive as any statute of limitations can be made. It applies to suits both in law and in equity; it applies to all classes of suits, and declares that no suit shall be maintained unless it be brought within two years. The question arose whether, under that statute, courts would create an exception in the case of concealed fraud. In an elaborate opinion by Mr. Justice Miller, the supreme court laid down the rule that this was an exception, notwithstanding the clear and comprehensive terms of the statute itself. The ground upon which these later rulings proceeds is well stated in a sentence which I will read from the case of *U. S. v. Wiley*, 11 Wall. 513:

"Statutes of limitations are indeed statutes of repose. They are enacted upon the presumption that one having a well-founded claim will not delay enforcing it beyond a reasonable time if he has the power to sue. Such reasonable time is therefore defined and allowed. *But the basis of the presumption is gone whenever the ability to resort to the courts has been taken away.* In such a case the creditor has not the time within which to bring his suit that the statute contemplated he should have."

I think this case falls within that doctrine. The right to sue was undoubtedly suspended during the pendency of proceedings in bankruptcy, and to say that the statute continued to run would be to say that the plaintiff is deprived of his right to sue without the slightest fault on his part.

The demurrer to the complaint is overruled. Defendant to answer in thirty days.

Bates and others v. Days.

BATES and others v. DAYS.

(*Western District of Missouri. July, 1883.*)

1. UNITED STATES COURTS — ATTACHMENT PROCEEDINGS — R. S. § 915 — PRIORITY.— Under the provision of section 915 of the Revised Statutes of the United States, a circuit court administers the law of the state in which such court is held regarding attachments; and when property has been attached in a suit in the United States court by the marshal, and the sheriff has levied an attachment issued from a state court on the goods in the hands of the marshal, the priority of the lien of the attaching creditors is to be determined by the state law.
2. SAME — PROPERTY IN HANDS OF MARSHAL — ATTACHMENT FROM STATE COURTS.— When writs issue from state and federal courts against the same property, the officer first obtaining possession, on being notified that a state court officer has a writ against the same property, should be offered all reasonable facilities to make a full return, and the officer holding the property should show in his return whatever was done by such state officer.
3. FEDERAL COURTS AND STATE COURTS NOT FOREIGN COURTS, OR IN HOSTILITY.— Federal courts and state courts are not foreign courts, or in hostility to each other, in administering justice between litigants. The citizen of the state in the federal court cannot be deprived of any right he has in a state court, and the citizen of another state has the same claim to a debtor's property in the state where he resides as a resident, but no more.

At law.

KREKEL, *District Judge*.—The facts in the case are as follows:

Bates, a citizen of New York, sued Days, a citizen of Macon City, Macon county, in the state of Missouri, by attachment on a claim amounting to \$3,800, and the United States marshal, on the twentieth day of March, 1882, under a writ, seized a stock of goods, books, notes and accounts, valued at \$12,000, as the property of Days. On the day of the seizure, one Rubey, a citizen of the state of Missouri, as assignee of the Macon City Savings Bank, sued out an attachment in the state court on Days on a claim of the bank

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for \$3,500, and the sheriff of Macon county, to whom the writ was directed, undertook to levy the attachment on the property seized by and in the actual possession of the United States marshal. In his return the sheriff states that he levied the attachment on the stock of goods of Days, subject to the attachment of Bates in the United States court, and that he notified the marshal of the attachment and levy, and that he summoned him as garnishee. Some days after the levy by the sheriff, Hemphill and Bailey, two non-residents of the state of Missouri, sued out an attachment each against Days in this court, and the United States marshal levied the same on the goods which he had seized on the attachment of Bates. The property attached was sold under an order of this court, and about \$8,000 realized. The first attachment of Bates, amounting, with costs, to about \$4,000, has been paid. There remains in the registry of the court the balance of proceeds, which is claimed by Rubey under his attachment, and by Hemphill and Bailey on their attachments. These adverse claims are the matter in controversy.

The difficulty grows out of the construction of the act of congress regarding attachments, and the application of its provisions to the state laws on the same subject. The laws of Missouri make provision for two or more attachments issuing out of the same or co-ordinate courts in the state, but are silent as to attachments in United States courts. Rubey, assuming that the state attachment laws prevailed in them, heretofore moved this court for an order directing a transfer of the cases from this to the state court, to have them determined under the state law. This application was denied, because non-residents of the state are entitled to have their controversies determined in the federal courts. Rubey thereupon applied to be made a party to the proceedings in this court, so as to enable him to assert his rights. Leave was granted. Hemphill and Bailey, though later than Rubey in time with their attachments, yet claim the proceeds in controversy, because they say Rubey has no standing in this court. This

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depends upon the construction given to the federal and state attachment laws. And first of the provisions of the federal statute:

Section 915 provides: "In common law cases in the circuit and district courts the plaintiff shall be entitled to similar remedies by attachment or other process against the property of defendant which are now provided by the laws of the state in which such court is held for the courts thereof." All other provisions regarding attachments, found in the United States statutes, pertain to exceptions or limitations, or look to the effective enforcement of state attachment laws. The remedies in the United States courts, under the provisions cited, are to be similar to those provided for the courts of the state. What are the remedies provided by the laws of the state of Missouri in cases such as the present? Section 447 of the statutes of Missouri is as follows:

"Where the same property is attached in several actions by different plaintiffs against the same defendant, the court may settle and determine all controversies which may arise between any of the plaintiffs in relation to the property, and the priority, validity, good faith and effect of the different attachments, and may dissolve any attachment, partially or wholly, or postpone it to another, or make such order in the premises as right and justice may require."

If the writs issue from different courts of co-ordinate jurisdiction, such controversies shall be determined by that court in which the first writ of attachment was issued.

Under the provisions of the laws of the United States cited, this court administers the laws of the state of Missouri regarding attachments. That law, as is shown in the provision cited, has amply provided for the case in hand, which requires the determination of the property between Rubey, Hemphill and Bailey. That Rubey, with his attachment in the state court, was prior in time to Hemphill and Bailey, is not disputed. But it is said that Day's property was in the

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hands of the United States marshal,—in other words, in the hands of the law,—and therefore could not be attached. This is true, if by attaching in a case like this is meant the actual seizing of possession of the property and the taking it out of the hands of the officer. In this case such seizure was unnecessary, for the property, as stated, was in the hands of the law. Yet something indicating the assertion of this right must be done by Rubey in order to entitle him to a lien or claim on the property and give him standing in this court. Rubey, being a citizen of the state of Missouri, could not sue Days in the federal court, because both were citizens of the same state. He was remediless unless the courts of the state afforded him redress. The attachment law did this, and upon suing out the writ and causing the same to be levied, and notifying the United States marshal, as he did, it gave him a lien on the surplus and a standing in this court such as enabled him to assert his rights, which he did in due time. Though the marshal's return shows that he made additional levies in the Hemphill and Bailey cases on the same goods he had seized under the attachment in favor of Bates, yet it is apprehended that if he had returned the second and third,—the Hemphill and Bailey writs,—with the indorsement that since the seizure under the Bates attachment additional writs of Hemphill and Bailey against the same property had come into his hands, and that he held the property subject to these several attachments, such a return would undoubtedly have been good. The executive officers of courts should understand that when writs issue from state and federal courts against the same property, the officer first obtaining possession, on being notified that a state court officer, as in this case, has a writ against the same property, all reasonable facilities should be afforded such officer to make a full return, and the officer holding the property should show in his return whatever was done by such state court officer. Federal and state courts are not foreign courts, or in hostility to each other, in

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administering justice between litigants. The citizen of the state in the federal court is as much in his own court as in the courts of the state. The rights he has he cannot be deprived of in a federal court. The citizen of another state has the same claim to a debtor's property in the state of Missouri as a resident, but no more. In the case before the court, Rubey being prior in time with his attachment to Hemphill and Bailey, is prior in right.

Attachments of state courts are valid and binding in federal courts, and their priorities are to be ascertained under the laws of the state, where no federal law interferes.

It might well be that the levy, as shown by the return of the sheriff, is good under the fifth subdivision of section 418 of the statute of Missouri, which provides "that when goods and chattels, money or evidences of debt, are to be attached, the officer shall take the same and keep them in his custody, if accessible; and if not accessible, he shall declare to the person in possession thereof that he attaches the same in his hands, and summon such person as garnishee." No stress, however, is laid on this provision, preferring the placing of the decision on the broader view of the law as stated.

The authorities cited for the non-resident claimants as to the necessity of an actual seizure to make a valid levy, and the want of such, as well as the insufficiency and illegality of garnishing an officer, are not in point. The property being once in the possession of the law, the court determines the rights of the parties before it having claims thereto. The judgment is in favor of Rubey for the balance in the registry of the court.

Upon motion for rehearing in the above cause, McCrary, *Circuit Judge*, delivered the following opinion:

Section 447 of the Revised Statutes of Missouri makes careful provision for the adjustment of all questions growing out of the levy of several writs of attachment issued

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from the same or from different courts upon the same property. The question here is, does it apply to a case where some of the writs issue from a state court and others from a federal court? I am clearly of the opinion that it does. The United States has no attachment law of its own, but its courts are required to administer the remedies by attachment which are provided by the law of the state in which such courts are held. R. S. § 915.

We must administer the attachment laws of the state as we find them, and so as to afford to suitors in the federal courts the same remedies afforded to suitors in the state courts; neither more nor less. To exclude the section above named from the attachment law of Missouri, which we are to enforce in the federal courts within that state, would be to favor the non-resident creditor, who can sue in this forum, by giving him an unfair advantage over the resident creditor who must sue in the state court, and who must, of course, abide by that statute. It may be true, as contended by counsel for plaintiffs, that there are difficulties in the way of the enforcement of this statute in the federal courts; but they are not insurmountable. If they were, the result would probably be to deprive this court of jurisdiction in attachment cases. If this court cannot administer the remedies by attachment according to the statute of the state, and afford to suitors *all* the remedies provided by those statutes, it may be doubtful, to say the least, whether it ought to entertain a suit by attachment at all.

The provisions of the attachment law of Missouri, providing a mode whereby questions of priority may be determined in such a case as this, are an important part of the state law upon the subject of attachment, and it seems to me that this court should administer the whole statute, and not a part only.

The other question presented relates to the sufficiency of the levy made by the sheriff under the writ of attachment issued from the state court. Upon this subject I am satisfied

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to abide by the reasoning of the district judge in his opinion herein upon the former hearing, fortified and supported as it is by the ruling of the supreme court commission and the supreme court of Missouri, in the precisely analogous case of *Patterson v. Stephenson*, April term, 1883.

The motion for rehearing is accordingly overruled.

The practice is not for the circuit court judge to hear motions in cases determined by the district judge when sitting in the circuit court, except at the request of the district judge, which was made in this case.

Dysart & Foster, for Rubey.

Botsford & Williams and *Mr. Carlile*, for Hemphill and Bailey.

TEXAS & ST. L. R'Y CO. in Missouri and Arkansas v. Rust and another.

(*Eastern District of Arkansas. April, 1883.*)

1. REMOVAL OF CAUSE — JURISDICTION OF CIRCUIT COURT, WHEN ATTACHES.— Upon filing the required petition and bond in a state court, in a cause removable under the act of congress, the jurisdiction of the state court ceases, and that of the circuit court immediately attaches. The entering of a copy of the record in the circuit court is necessary to enable the court to proceed, but its jurisdiction attaches when the requisite petition and bond are filed in the state court.
2. SAME — FILING OF RECORD — TIME.— The act of congress requires the party removing the cause to file a copy of the record on the first day of the next session of the circuit court occurring after the removal. But it may be filed by either party before that time; and when filed and upon due notice, the circuit court will make such interlocutory orders in the case as may be necessary to preserve the property or protect the rights of the parties.

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3. **SAME — MOTION MADE IN STATE COURT — RECEIVER — INJUNCTION.**— Where an injunction is granted and a receiver appointed by the state court without notice to the defendants, and no motion to dissolve the injunction and discharge the receiver is made and acted upon in the state court before the removal of the cause, such motion may be made and heard in the circuit court, upon due notice to the plaintiff, at any time after the record in the case is filed in that court.
4. **SPECIFIC PERFORMANCE — WHEN DECREED.**— Before a court can decree a specific performance of a contract, the party seeking the relief must establish his right thereto by satisfactory evidence, and this can only be done on the final hearing of the cause.
5. **SAME — CASE STATED.**— The plaintiff railway company entered into a contract with the defendants for the construction by the latter for the former, of a railroad bridge across the Arkansas river. Differences arose between the parties as to their respective rights under the contract, which resulted in stopping work on the bridge. The plaintiff thereupon filed a bill, asking the court to take possession of the defendants' plant and complete the bridge, with funds to be furnished by the plaintiff; leaving all questions of difference between the parties for future settlement or adjudication. *Held*, that the court had no power to seize and use the defendants' plant, and that it would not undertake the work of completing the bridge.

On the twenty-second of April, 1882, a contract was entered into between the plaintiff railway company and Rust & Coolidge, the defendants, for building a railroad bridge across the Arkansas river. The defendants were to complete the bridge by the first of November, 1882, and were to receive therefor the sum of \$305,000, to be paid on "*pro rata* monthly estimates, ninety per cent. thereof to be paid during progress of the work, upon material furnished and work performed, and balance due upon completion thereof."

The contract contains this provision:

"In case of non-completion of the bridge upon November 1, 1882, or of providing a crossing for trains by said date, then, in such event, the sum of \$1,000 per week, for the period of time such completion or provision for crossing of trains is delayed, shall be deducted from said contract

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price; and in like manner, should the bridge be completed at an earlier date than November 1, 1882, then, in such event, the sum of \$1,000 per week shall be added to said contract price for the period by which said fixed date of completion shall be anticipated."

Rust & Coolidge entered upon the work of building the bridge, but it was not completed the first of November, and is not yet completed. The defendants continued to work on the bridge, and their monthly estimates for work done and materials furnished were honored and paid by the railway company down to and including the month of April, 1883. The total amount thus paid by the railway company to the defendants under the contract was \$268,000.

The May estimate for work done and materials furnished, amounting to \$15,932.58, after deducting the ten per cent., the railway company refused to honor. In a letter of the defendants of June 29, 1883, they state that unless the differences between the parties are adjusted at a proposed conference, "we shall, upon Saturday, July 7, 1883, stop or suspend work upon the Arkansas river bridge until a definite understanding is reached." A conference took place between the president of the railway company and the defendants, at Pine Bluff, on the sixth of July, 1883. They were unable to reconcile their differences, and on the same day the plaintiff brought suit, by attachment, in the Jefferson circuit court against the defendants for \$35,000, being \$1,000 per week for the number of weeks that had elapsed since the first of November, 1882, and caused the defendants' plant at the bridge, consisting of machinery, tools, houses for hands, camp, camp equipage, and provisions, to be attached. The next day the plaintiff filed a bill against the defendants on the equity side of the Jefferson circuit court, setting up, in substance, that the road was completed and ready for traffic, and that the running of trains thereon was only prevented by the non-completion of the bridge; that the bridge could be completed in twenty or thirty

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days; that the defendants had been paid the full contract price for building the bridge, counting as part payment the weekly forfeiture of \$1,000 for thirty-five weeks; that at the conference between the president of the railway company and the defendants, the day previous, the latter demanded of the plaintiff, as a condition of going on with the work, a release from all claims for damages by reason of the delay in the completion of the bridge, and also \$20,000 for extra work and materials, and threatened, if these demands were not acceded to, to stop work on the bridge and remove their plant out of the state; and that plaintiff believed they would carry their threat into execution, unless restrained; that the plant for the construction of the bridge was of such a character that, if removed, it would cost a large sum of money and take months to replace it; and that the plaintiff and the public were deeply interested in a speedy completion of the bridge, to the end that the railroad might be opened for traffic. The bill concludes as follows:

"The plaintiff is willing to pay into the registry of this court such sum as shall be necessary for the completion of said work, if such court shall order and direct the progress of the work by a receiver appointed by the court. The premises considered, the plaintiff prays for process according to law that the said defendants, their agents, servants or employees, and all other persons, be restrained and enjoined from destroying, injuring, or interfering with, or removing, said tools, machinery, or appliances necessary to said work, or the materials used therein; and that a receiver be appointed by the court to take charge of said work, and the material, fixtures and tools used therein, and proceed to carry out and complete the same in accordance with the specifications thereof, and for said purpose be fully authorized to employ men and labor, and use the tools of defendant therefor."

Upon filing this bill, without notice to the defendants or

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their agents, the state court made an order enjoining the defendants from taking possession of, using, or in any manner interfering with their plant at the bridge, and appointing a receiver "with full power and authority, so far as possible for him to do, to carry out and execute in full, and according to the specifications thereof, the contract between the plaintiff and defendants in relation to the building of said bridge, and for said purpose he is hereby authorized and empowered to take charge of and use all material now in the vicinity of said work, together with all the tools, machinery, or other appliances necessary to the work thereon, offices and houses for hands, kitchen and dining-room furniture," and concludes with an order to the sheriff to turn over to the receiver the defendants' plant in his custody on the writ of attachment. The order does not state from what source the receiver is to obtain funds to carry on the work. On the ninth of July the defendants filed in the state court their petition and bond for the removal of the cause to this court, on the ground of the citizenship of the parties. The record in the case was filed in this court on the twelfth of July, and afterwards the defendants, upon due notice to the plaintiff, moved to dissolve the injunction and discharge the receiver. Thereupon the plaintiff moved for leave to amend its bill, which leave was given, and an amended bill filed accordingly. The amended bill sets out at length the contract and correspondence between the parties; repeats the allegations of the original bill, with some variations of statement and addition of detail; alleges that the defendants, in making their proposal and estimates for the building of the bridge, included in the same the value of the use of the plant, tools and machinery required to be used by the defendants in the construction of the bridge, and that the estimates that were made from time to time included the value of the use of said plant, and entitled plaintiff to the use of said plant until the completion of the bridge; that at the Missouri and Texas state lines the

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plaintiff's road connected with roads in these states, making the road in this state a connecting link in a continuous line, extending from Gatesville in Texas to Cairo, Illinois, a distance of about seven hundred and fifty miles, and that as soon as the bridge is completed so that trains can cross thereon, the United States mail will be carried over the whole of said line; that the bridge is so nearly completed that the same can be finished in twenty days, at an expense of not more than \$10,000, "in connection with the use of the materials, tools, machinery and plant now at said bridge," but that if defendants are allowed to remove their plant the bridge cannot be finished in a less period than six months, and at a cost of not less than \$50,000; that plaintiff "is willing to pay and indemnify the defendants from any and all loss which they may sustain by reason of the institution of this suit, if wrongfully brought, and the use of the plant and property of the defendants by the receiver in the completion of said bridge." The bill does not allege that the defendants are insolvent. The defendants have filed an answer to the original and amended bill, in which the delay in the construction of the bridge is stated to have arisen from sickness of laborers,—particularly skilled laborers, whose places could not be supplied,—from bad weather, repeated and unlooked-for floods in the river, and other causes of like nature; that from these and like causes the plaintiff was delayed in the construction of its road, and had no use for the bridge down to the time of the institution of this suit; that plaintiff never complained at the delay in the construction of the bridge, and paid the monthly estimates for work and material promptly down to and including the April estimate, and that it waived the weekly forfeiture of \$1,000 for the non-completion of the bridge after the first of November; that the whole of the May estimate was due to them, and that plaintiff's refusal to pay same was without excuse or justification; that there is a large sum due defendants for extra work and materials; that defendants did not stop work

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on the bridge of their own will, but that the work was stopped by the levy of the plaintiff's attachment on the defendants' plant; that defendants did not intend to stop work after their interview with the president of the company, and that at such interview they did not threaten to stop work on the bridge and remove their plant unless the plaintiff would release all damages for non-completion of the bridge and pay them \$20,000 for extra work; denies that the defendants or any of their agents, with their knowledge and consent, injured or damaged the plant or materials for the bridge in any way; and denies that plaintiff has paid for the use of defendants' plant, or is entitled to the use and possession thereof.

Several affidavits were filed in support of the answer.

H. K. & N. T. White, Phillips & Stewart and John McClure, for plaintiff.

M. L. Bell and U. M. & G. B. Rose, for defendants.

CALDWELL, *District Judge*.—It is settled that upon filing the required petition and bond in the state court, in a cause removable under the acts of congress, the jurisdiction of the state court ceases, and that of the circuit court of the United States immediately attaches. The entering of a copy of the record in the circuit court is necessary to enable that court to proceed, but its jurisdiction attaches when the requisite petition and bond are filed in the state court. *Nat. Steamship Co. v. Tugman*, 106 U. S. 118 (*S. Ct. 1 Sup. Ct. Rep. 58*); *Railroad Co. v. Koontz*, 104 U. S. 5.

The act of congress requires the party removing the cause to file a copy of the record on the first day of the next session of the circuit court occurring after the removal. But it may be filed by either party before that time. And where any order or direction of the court is necessary to preserve the property in litigation, or protect the rights of the par-

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ties before the next session, the court will grant leave to either party to file the record, and will make such interlocutory orders as the case seems to require, and as it would have power to make between the commencement of an action originally brought in that court and the term at which it could be tried. Section 6 of the act of March 3, 1875, provides that the circuit court shall proceed in a removal cause as if it had been originally commenced in that court, "and the same proceedings had been taken in such suit in said circuit court as shall have been had therein in said state court prior to its removal."

Undoubtedly, if this cause had been commenced in this court, and an injunction granted and a receiver appointed without notice, the court, upon notice to the plaintiff, would have heard a motion to dissolve the injunction and discharge the receiver before the term at which the case would be triable.

If this cause had remained in the state court, the defendants would have had the right to make this motion and had it determined before the term to which the writ was returnable. Gantt's Dig. §§ 3477-3480.

But the defendants were not bound to make the motion and submit it to the determination of that court. If they had done so, and that court had denied the motion, and they had then removed the cause, this court would not have entertained the motion on the same record until the trial term. *Hot Springs Cases*, MS. Op.

But the injunction having been granted and the receiver appointed without notice to the defendants, and no motion to dissolve the injunction and discharge the receiver having been made in the state court, such motion may be made, upon notice to the plaintiff, in this court, at any time after the record is filed. Dillon, Rem. § 80, p. 99; *Mahoney Mining Co. v. Bennett*, 4 Sawy. 289.

In disposing of the motion before the court it is not necessary to determine whether a court of chancery will, in

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any state of case, undertake to enforce specific performance of a contract to build a railroad bridge. The plaintiff's bill is not one for specific performance of the contract to build the bridge. The bill is an anomaly in equity pleading. No precedent for it has been produced, and it is believed none can be found. It is not framed to secure a specific performance of the contract by the defendants, nor to settle the controversy between the parties. Whether the plaintiff waived the right to the \$1,000 per week after the first of November; whether the defendants were entitled to be paid the May estimate; and whether they are entitled to receive anything for extra work and materials,—are matters which are material and necessary to be determined before specific performance of the contract could be decreed, if, under any circumstances, a court of equity would undertake to enforce specific performance of such a contract; and yet all these disputed questions, the determination of which would be absolutely essential before it could be known whether the plaintiff was entitled to the aid of a court of equity to enforce specific performance of the contract, are by the bill in terms left to be determined after the court has taken it upon itself to seize the property of the defendants and complete the bridge; and then these questions are not to be determined in *this* suit, but in the suit at law already pending, and such other suits as may hereafter be brought, or by convention of the parties, or by arbitration. The exact language of the bill on this point is that "the plaintiff is willing to waive for the time being all questions and differences in relation to the construction to be placed upon the said contract between the complainant and the defendants, as well as the amount that may be due from one to the other, and hereby proffers to advance this *court*, or to the receiver hereinafter prayed for, such a sum of money as will fully pay for the completing of said bridge, leaving all questions of differences between the complainant and the defendants to be hereafter settled, without prejudice to the rights of

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either of the parties hereto, by compromise, arbitration, or in due course of law, as the said parties may elect."

It is an elementary principle of equity law, that, before a court can decree a specific performance of a contract, the party seeking such relief must establish his right thereto by satisfactory evidence, and this can only be done upon final hearing of the cause. It cannot be done upon an *ex parte* statement, and without notice to the party against whom the relief is sought. In this case, as it stands, there is nothing from which the court can form any opinion as to the merits of the case. There is no evidence on the essential points of difference—nothing but the opposing statements of the parties. If, as claimed by defendants, the plaintiff waived the weekly forfeiture, and they are entitled to compensation for extra work and labor, then they were entitled to have the May estimate honored, and the party in default is the plaintiff. So far from asking that the defendants be required to specifically perform the contract on their part, the court is asked to take from them their tools, machinery, camp and camp equipage and enjoin them from doing anything in the premises.

Stripped of its irrelevant and declamatory statements, the case made by the bill is this: That the plaintiff and defendants have a misunderstanding as to their respective rights under the contract for building the bridge; that the materials are on the ground to complete the bridge, and that with the use of the defendants' plant—consisting of machinery, tools and camp equipage—it can be completed in a short time; but that without the use of this plant the completion of the bridge will be much delayed and its cost enhanced, to the great damage of the plaintiff and the inconvenience of the public; and that the use of the defendants' machinery and tools is absolutely necessary to avoid the delay and damage to the railroad company and disappointment to the public. Upon this showing an injunction is prayed against the defendants enjoining them from using or taking possession of their machinery, tools and entire plant

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used in carrying on the work of the bridge; and the *court* is asked to take possession of this plant and go forward with the work and complete the bridge "in accordance with the specifications;" the plaintiff generously promising to furnish the means to discharge the pecuniary obligations incurred by the court in carrying out the enterprise, and also offering to give a bond to pay the defendants the value of the rent of the tools during the time they are used by the court. It is the defendants' plant for building the bridge, and not the materials which enter into the construction of the bridge, which the court is asked to seize and use. The materials for the bridge belong to the plaintiff; the plant to the defendants. What authority has a court of chancery to seize and use the property of one citizen for the benefit of another, without a trial or a hearing? No exigency of a railroad company, and no considerations of public convenience, however great, will justify the act to the law.

If the necessities of the plaintiff, and the public necessity, will warrant the seizure and use of the defendants' tools and machinery, it is not perceived why the same considerations would not make it the duty of the court to seize and use the tools of other citizens, or the mules of the neighboring planters. Courts possess no such absolute and despotic power over the property of the citizen. The citizen cannot be deprived of his property or its possession "without due process of law," and a simple bond to pay the owner the value of a forced loan of his property is not the equivalent of the due process of the law contemplated by the constitution. In effect, the court is asked to compel a forced loan of the defendants' tools, machinery and camp equipage, and when it secures possession of them it is asked to use them in completing the bridge, and to appoint an agent for that purpose. A receiver is the agent of the court; he is an officer of the court, and his possession is that of the court. He is not the agent of either party, and neither party is responsible for his misfeasance or malfeasance. And for this reason courts should not assume to place the private property

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of the citizen, or the conduct of his business, in the hands of a receiver, except where both the right and the necessity to do so are clear.

Courts are poorly adapted to the business of building railroad bridges. If not properly constructed, the most serious consequences to life and property are likely to result. Their proper construction requires a high degree of engineering skill, which this court does not possess. Any court which engages in the business is liable to commit grave mistakes, and inflict great wrong and hardship, for which the injured parties will have no redress; for the errors and mistakes of the court, though they may ruin a citizen, are placed in the category of injuries produced by the law, and for which the law furnishes no redress. Certainly no court ought to engage in the business, when it would have to resort, in the beginning, to the exercise of such questionable powers to get the tools to carry on the work. It is obvious that the sole object of the bill in this case is to obtain, through the agency of the court, the use of the defendants' plant until the bridge can be finished. If the court should continue the forced loan of the defendants' tools and complete the bridge, it would have to settle with the plaintiff for the money received, and there this case would end, leaving every question in dispute between the parties where it stood when this case was begun. This would be proceeding by inversion. The method has too much the air of that proceeding by which a man is first hung and tried afterwards, to find favor in court of equity.

Let an order be entered dissolving the injunction and discharging the property from the custody of the receiver, and requiring him to return the same to the officer or person from whom he received it, and to pass his accounts in the master's office without delay.

See *City of Chicago v. Hutchinson*, 15 Fed. Rep. 129; *Glover v. Shepherd*, id. 883; *Phoenix Mut. Life Ins. Co. v. Walrath*, 16 Fed. Rep. 161; *Public Grain & Stock Exchange v. Western Union Tel. Co.* id. 289.—*[Federal Reporter]*.

Tice v. School District No. 18, Adams County, Nebraska.

TICE v. SCHOOL DISTRICT No. 18, ADAMS COUNTY, NEBRASKA.

(District of Nebraska. August, 1883.)

1. **CIRCUIT COURT—CHANCERY JURISDICTION—STATE STATUTE—NEW TRIALS.**—The statute of Nebraska, regulating the practice of the state court in determining applications for new trials, is not binding upon the circuit court of the United States when exercising its chancery jurisdiction; and the limitation in the state statute which forbids the state courts to grant new trials after one year, so far from being a limitation upon the circuit court, sitting in chancery, may be the very ground of its jurisdiction, especially where the facts which make it proper that the judgment should be set aside have been fraudulently secreted until the year has passed.
2. **SAME—JURISDICTION, HOW CONFERRED.**—The chancery jurisdiction of the circuit court is conferred by the constitution of the United States and the acts of congress, and is not derived from or limited by state laws. The rules governing its exercise are the same in all the states, and are according to the practice of courts of equity in England, as contradistinguished from courts of law.
3. **SAME—STATE STATUTES OF LIMITATIONS.**—Federal courts of equity usually follow by analogy state statutes of limitations, but they will not do so when the effect of such a statute in any case is to limit their general chancery jurisdiction; and although a state statute of limitations may make no exception in favor of a party who is prevented from suing by reason of a concealed fraud, they will enforce such an exception because it is a part of the chancery law as administered in those courts, which the state cannot change.
4. **NEW TRIAL—POWER OF CHANCERY COURT TO DECREE.**—It is a general principle of law that a court of chancery may decree a new trial after the courts of law are barred by lapse of time from so doing.

On rehearing.

Bill in equity brought to set aside a judgment at law in this court, and for a new trial upon the ground of surprise at the trial, and newly-discovered evidence. The original suit was brought by the plaintiff to recover judgment upon certain bonds alleged to have been issued by the defendant school district for the purpose of building and furnishing a public school house. The district interposed the defense that the bonds were never issued by it by a vote of the district, and that no money was ever received by the district

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for the same. The plaintiff was a purchaser of the bonds in the market, and had no personal knowledge of the facts. Upon applying to the officers of the district for information, he was informed by them that they had no knowledge of the issuance of said bonds, or of the receipt of any money thereon by the district. On the trial of the original case one Alexander, who was then the treasurer of said district, testified that he was likewise such treasurer at the time the bonds were issued, and that he had no knowledge or recollection of the execution or issuance of the same, or of the receipt of any money by the district therefor, and the other officers of the district testified to substantially the same effect. The residents of the district and its officers seem to have combined and conspired together to keep plaintiff from obtaining any evidence to establish the fact that the bonds were issued and the money thereof received by the district and used to erect a school house. Nevertheless, such now appears to be the fact. In this case Alexander testifies that he *now* remembers that the *bonds* were sold for cash, and that the cash was used in the erection of a school house. These facts, however, were not discovered until more than one year from the date of the judgment. The statute of Nebraska provides that "where the grounds for a new trial could not with reasonable diligence have been discovered before, but are discovered after, the term at which the verdict, report of referee, or decision was made, the application may be made by petition, filed as in other cases, on which a summons shall issue," etc.; but "no such petition shall be filed more than one year after the final judgment was rendered." The district judge held, on final hearing, that this statute was controlling, and that, therefore, the bill was filed too late, but granted a rehearing, and requested the circuit judge to hear and determine the question.

Harwood & Ames, for complainant.

O. B. Hewett, for defendant.

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McCARY, *Circuit Judge*.—After much consideration, I have reached the conclusion that the statute of Nebraska, regulating the practice of the state courts in determining applications for new trials, is not binding upon this court when exercising its chancery jurisdiction. Our jurisdiction in chancery is not derived from or limited by state laws. The rules governing its exercise are the same in all the states, and are according to the practice of courts of equity in the parent country, as contradistinguished from courts of law. It is a jurisdiction conferred by the constitution of the United States and the acts of congress, and if it could be controlled or varied by state legislation, it could be extinguished by the same authority. This proposition was strongly stated by the supreme court of the United States in the early case of *Robinson v. Campbell*, 3 Wheat. 218, and has been since repeatedly recognized by that court. It is true that the federal courts of equity usually follow by analogy state statutes of limitations; but they will not do so if the effect of such a statute in any case is to limit their general chancery jurisdiction. This, although a state statute of limitations may make no exception in favor of a party who is prevented from suing by reason of a concealed fraud. Yet federal courts of equity will enforce such an exception because it is a part of the chancery law as administered in those courts, and which the state cannot change. *Johnson v. Roe*, 1 McCary, 162; *S. C.* 1 Fed. Rep. 692.

The present case might, perhaps, be decided upon this doctrine, for it is clearly established by the proof that the defendant, by its officers and agents, fraudulently suppressed the fact that the bonds in question had been regularly issued, sold for cash by defendant, and the proceeds used by the defendant to build a school house, and they concealed these facts until they supposed it was too late for plaintiff to get relief; after which they disclosed them, and one of them has now sworn to them.

However this may be, I think the statute above mentioned,

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if construed to mean that a bill in chancery cannot be filed in a federal court to set aside a judgment at law, upon any ground, after one year from its rendition, would be an encroachment upon the equity jurisdiction of the federal judiciary. Anciently, appeals to the courts of chancery for relief against unconscionable judgments at law were frequent; but in modern times courts of law are themselves authorized to grant new trials upon liberal terms, and this mode of relief is, in general, ample, so that the equity jurisdiction in such cases is seldom invoked. It nevertheless exists, and it is a mistake to say that it is simply co-extensive with the powers granted by statute to courts of law. It more frequently begins precisely where the power of the law courts ends. The jurisdiction often depends upon the fact that the court rendering the judgment is powerless to afford a remedy. I hold, therefore, that the limitation in the state statute which forbids the state courts to grant new trials after one year, so far from being a limitation upon this court, sitting in chancery, may be the very ground of our jurisdiction, especially where the facts which make it proper that the judgment be set aside have been fraudulently secreted until the year has passed.

It appears that even the state courts of Nebraska, when sitting in chancery, disregard the limitation of one year. Thus, in the case of *Horn v. Queen*, 4 Neb. 108, the supreme court of that state, construing this very statute, held that where it would be proper for a court of law to grant a new trial, if the *application had been made while that court had the power*, it is equally proper for a court of equity to do so if the application be made when the court of law has no means of granting such trial. Certainly, if this be a sound rule for the government of the state court whose jurisdiction, both at law and in equity, is derived from state law, it is, *a fortiori*, the sound rule here. That it is a general principle of equity law that a court of chancery may decree a new trial after the courts of law are barred from so doing, is

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abundantly established by authority. Hil. N. T. 588, note (a); *Hoskins v. Hattenback*, 14 Iowa, 314; Story, Eq. Jur. § 887; *Fletcher v. Warren*, 18 Vt. 45; *Colyer v. Langford's Adm'rs*, 1 A. K. Marsh. 237; *Ballance v. Loomiss*, 22 Ill. 82.

The order dismissing the bill must be set aside; and it is so ordered.

Love, *District Judge*, concurs.

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(*District of Iowa. 1883.*)

1. JURISDICTION IN ADMIRALTY — COLLISION OF VESSEL WITH STRUCTURES IN RIVER AND ON LAND. — There is a clear distinction between torts arising from the collision of boats with structures placed in the navigable bed of a river, and torts resulting from collisions of boats and vessels with structures on land, whether immediately along the shore or not. Torts of the former class are within the admiralty jurisdiction, and torts of the latter class are of common law cognizance; and whether the structures are solid or floating, realty or personalty, firmly fixed to the bed of the river or otherwise, does not affect such jurisdiction.
2. SAME — PROCEEDING IN PERSONAM — UNLAWFUL OBSTRUCTION. — Where a vessel is injured by a collision with a structure unlawfully placed in the navigable bed of a river, the party creating the obstruction may be sued for the injury in an action *in personam* in a proper court of admiralty; but the owners of the vessel cannot in such a case proceed *in rem* against the solid structure, whatever it may be, because there can be no maritime lien upon such a structure to be enforced in the admiralty by its seizure and sale.
3. SAME — LAWFUL ERECTION OF STRUCTURE. — Where a structure lawfully created in the navigable bed of a river is injured by a collision caused by the negligent management of a vessel, the owner of such structure may proceed in an admiralty court by action *in personam* against the owners of the vessel, or *in rem* against the vessel itself.
4. SAME — COMMON LAW — LIEN ON MOVABLES. — The admiralty jurisdiction owes its existence chiefly to the fact that the common law tribunals, by reason of their modes of procedure and their doctrine

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that possession is indispensable to a lien upon movables, are wholly inadequate to give relief against ships and vessels afloat upon the high seas and navigable waters of the earth.

5. SAME — FLOOD — COLLISION OF VESSEL WITH BUILDING ON LAND.—

The jurisdiction of the admiralty over marine torts depends upon locality,—the high seas or other navigable waters within admiralty cognizance; and, being so dependent upon locality, the jurisdiction is limited to the sea or navigable waters, not extending beyond high-water mark; and where a building erected on land near a navigable river is injured by collision caused by the negligent management of a vessel which had been floated against it by reason of a flood raising the waters of said river above the banks thereof and carrying said vessel beyond said banks, this does not constitute a tort within the jurisdiction of a court of admiralty.

In admiralty.

This is a proceeding *in rem*. The defendant steamer was libeled for an alleged marine tort, to the damage of the plaintiff's property.

The libelants allege that they are the owners of a depot for the reception and storage of oil upon the levee of the city of Keokuk, near the Mississippi river; that on or about the twenty-fourth day of April, 1882, by reason of an unusual and extraordinary flood of said river, the water extended up to and around the libelant's said property; that, in consequence of the careless, negligent and unskilful manner in which said steamer was managed and navigated, she was floated and propelled upon and against the libelant's said property, whereby a tank containing a large quantity of oil was crushed and broken, and the oil destroyed, etc., to the damage of the libelant in the sum of \$600, etc. To this libel the intervening claimants except, upon the ground that the tort complained of, as stated in the libel, is not of admiralty jurisdiction.

Anderson Bros. & Davis, for libelant.

Hagerman, McCrary & Hagerman, for claimant.

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LOVE, *District Judge*.—Locality is the test of admiralty jurisdiction over marine torts. When, before the decision in *The Genesee Chief*, 12 How. 443, it was settled that there was no jurisdiction in admiralty above tide-water, it was also settled that a marine tort committed above tide-water was not within the cognizance of the admiralty. When, in that case, the supreme court decided that navigability, and not the flux of the tides, is the true test of this jurisdiction, the American courts of admiralty took cognizance of maritime contracts and torts upon our navigable rivers above as well as below tide-water; and, locality being the test of jurisdiction over marine torts, the only question in the present case is whether the trespass was committed upon land or upon navigable water.

The exceptions to the present libel raise this important question: What is the true *limit* of admiralty jurisdiction in questions of tort upon our great navigable rivers? Locality being the test of admiralty jurisdiction in such cases, have we any test as to locality itself upon those great rivers which, flowing ordinarily in well-defined channels, not unfrequently rise high above their banks, and cover with their floods extensive regions of country, from bluff to bluff, with a depth of water sufficient to float vessels of considerable size and burden? This precise question could not have arisen prior to the case of *The Genesee Chief*. When the test of admiralty jurisdiction was the flux and reflux of the tides, the flow of the tide then marked the utmost limit of admiralty jurisdiction, and it ordinarily defined a sufficiently certain boundary. Wherever the tides prevailed there was navigation and maritime commerce, and, by consequence, admiralty jurisdiction. Hence, when a marine tort was committed, there could have been little difficulty in determining by its locality whether it was within the admiralty jurisdiction or not. But the test of admiralty jurisdiction now being, not the tide flood, but navigability, and such rivers as the Missouri and Mississippi being subject to extraordinary

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and capricious fluctuations, it often becomes a difficult question to determine whether or not a tort committed upon their waters is within the admiralty jurisdiction.

I understand libellant's counsel in this case to contend that it is a question of actual navigation in each case, and that the jurisdiction of the admiralty is co-extensive with the navigation of the vessel. A marine tort, therefore, may be committed within the jurisdiction at any place where the vessel floats upon the waters of a navigable river, whether within its ordinary banks or elsewhere. I am not myself prepared to accept this doctrine. Suppose a vessel floating far from the ordinary banks of the river, over widely extended bottom lands, should, by the negligence of the navigator, strike and injure some man's fences, houses or barns, could the tort be brought within the cognizance of the admiralty? Again, suppose some individual should negligently, or without authority or warrant of law, place an obstruction or erection of any kind, not in the navigable channel of the river, but upon some wide bottom land, and a vessel floating over the same during an overflow should run upon the obstruction and receive injury, could the owners of the vessel sue the party creating the obstruction *in personam* in a court of admiralty? It seems to me that to these questions a negative answer must be given. Yet it is very certain that a case of tort arising from the collision of a vessel with a structure of the same kind, placed without license or authority in the bed of the river and in navigable water, would be within the admiralty jurisdiction. *Atlee v. Packet Co.* 21 Wall. 389; *Railroad Co. v. Steam-tow Co.* 23 How. 209.

What, then, it may be asked, is the criterion of jurisdiction as to place or locality upon these great, ever-changing navigable rivers? When is the locality or place where a tort is committed within admiralty cognizance and when not? I do not myself feel called upon to answer this general question. Though highly desirable, it would no doubt be extremely difficult to lay down any general rule or crite-

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tion by which the jurisdiction could be tested in all cases. For the decision of the present case suffice it to say that there is a clear distinction running through the cases between torts arising from the collision of boats with structures placed in the navigable bed of the river, and torts resulting from collision of boats and vessels with structures on land, whether immediately along the shore or not. Torts of the former class are within the admiralty jurisdiction; torts of the latter class are of common law cognizance. The solution of the question of jurisdiction does not depend, in my judgment, upon the fact of the structure being solid or floating, realty or personalty, firmly affixed to the bed of the river or otherwise. It is a question of place, and of the rightfulness of the structure. Is the structure in the navigable bed of the river, and is it there by lawful authority or not? If the structure is placed in the navigable bed of the river without rightful license or authority, and a vessel is injured by it, the party creating the obstruction may be sued for the injury in an action *in personam* in a proper court of admiralty. This is manifest from the cases of *Atlee v. Packet Co.* and *Railroad Co. v. Steam-tow Co.* cited above.

The owners of the boat cannot, of course, in such case proceed *in rem* against the solid structure, whatever it may be — whether a bridge, a pier, boom, or signal-post — because there can be no maritime lien upon such a structure to be enforced in the admiralty by its seizure and sale. Such is the doctrine in the case of *The Rock Island Bridge*, 6 Wall. 213.

But suppose, on the other hand, the structure, whether bridge, boom, pier, or light-house, be a lawful one; suppose it to be placed in the navigable bed of the river by lawful authority; and suppose some reckless mariner should carelessly run his vessel upon it and injure it; can it be doubted that the tort thus committed would be within the admiralty jurisdiction? Can it be doubted that in such case the owner of the structure might proceed against the owners of the

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boat *in personam*, or against the boat itself *in rem*? The tort itself would be a marine tort; it would be, as to place, within the admiralty jurisdiction. The owner of the structure would have a right to proceed *in rem* against the boat, because, from its nature, a maritime lien could attach to the boat. The owner of the structure would, in this respect, have a certain advantage over the owner of the boat, since the latter, if injured, would be restricted to the remedy *in personam*. And this is exactly as it should be, since the boat is a moving, transitory thing, and if no maritime lien attached to it, and no remedy existed in admiralty to enforce the lien, the boat might take its departure into distant states or foreign jurisdictions, leaving the owner of the structure without any effectual remedy. Indeed, the admiralty jurisdiction owes its existence chiefly to the fact that the common law tribunals, by reason of their modes of procedure, and their doctrine that possession is indispensable to a lien upon movables, are wholly inadequate to give relief against ships and vessels afloat upon the high seas and other navigable waters of the earth.

There is, therefore, good reason why the maritime lien and the admiralty jurisdiction should obtain in favor of the owner of a lawful structure, injured by the negligent navigation of a colliding vessel. The common law could give him no adequate relief. But this reason does not apply reciprocally in favor of the owner of the vessel as against the solid structure, which cannot move off and leave the owner of the vessel without remedy. Hence there is no necessity for establishing a lien upon such a structure, or enforcing the plaintiff's claim by a proceeding *in rem*. And since it is settled beyond question, by *The Atlee* and *Tow-Boat Cases*, that the owners of the boat would have a right to proceed *in personam*, in admiralty, against the owners of the structure, why should the reciprocal right of the owners of the structure to a remedy in admiralty against the boat be denied?

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So much respecting the jurisdiction of the admiralty over torts arising from the collision of vessels with structures erected within the navigable waters of a river.

Let us now consider the question of jurisdiction with respect to the collision of boats and vessels with structures upon land, whether along the banks and shores of the river, or in towns and cities situated upon it. Does the admiralty jurisdiction extend to such torts? I am quite clear that it does not. The reason is obvious. Such torts are not marine. They are committed upon land; not upon or within the navigable waters of the river. The test of admiralty jurisdiction over torts is locality, and locality is against the admiralty jurisdiction where the tort is committed upon land. I know of no case in all the books, and the industry of counsel seems to have found none, in which it has been held that the court of admiralty has jurisdiction of any tort committed or *consummated* upon land. There is, of course, a remedy for such torts, but the remedy is in the common law courts. There must have been in this country collisions without number of vessels with such structures upon land as wharves, quays, piers, business houses, light-houses, upon the shore, etc. Why, then, has no case been produced in which the admiralty has taken jurisdiction of injuries resulting from such collisions? I cannot account for this except by the assumption that such cases have been, by common consent, regarded as not within the jurisdiction of the admiralty.

Several cases have been decided in the district courts of the United States holding that the jurisdiction in admiralty does not extend to injuries caused by boats and vessels to wharves, piers and bridges. Thus in *The Neil Cochran*, 1 Brown, Adm. 162, the court held that "an action will not lie in admiralty against a vessel to recover for damages done to her by a bridge thrown over a navigable stream." In *The Ottawa*, id. 356, the court decided that "an action will not lie in admiralty against a vessel to recover damage done

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by her to a wharf projecting into a navigable river." See, also, *The Mary Stewart*, 10 Fed. Rep. 137. And the supreme court of Michigan in *The City of Erie v. Canfield*, 27 Mich. 479, in an opinion by Judge Cooley, held that "a boom being a structure pertaining to the adjacent land as much as a wharf or building thereon, assuming that it extends no further out than the land owner might properly, with due regard to navigation, extend it, a wrongful injury to it would not be a maritime injury, and could not be redressed in a court of admiralty."

It seems to me that the doctrine announced by the supreme court of the United States in the case of *The Plymouth*, 3 Wall. 20, is conclusive of the present question. It is true that this case is not exactly analogous to that of *The Plymouth* in its circumstances, but we must be guided by the principle upon which that case was decided. In that case, the vessel lying at a wharf in the Chicago river, which was subject to admiralty jurisdiction, took fire, which, spreading to certain store-houses on the wharf, consumed them and their stores. It was held not to be a case of admiralty jurisdiction. What was the leading principle of the decision? "It is well observed," says the court, "that the entire damage complained of by the libelants as proceeding from the negligence of the master and crew, and for which the owners of the vessel are sought to be charged, occurred, not on the water, but on the land. The origin of the wrong was on the water, but the substance and consummation of the injury on land." "It is admitted by all the authorities that the jurisdiction of the admiralty over marine torts depends upon locality,—the high seas, or the other navigable waters within admiralty cognizance; and, being so dependent upon locality, the jurisdiction is limited to the sea or navigable waters not extending beyond high-water mark."

Again, the court says the simple fact that the injury originated on the Chicago river, the whole damage having been done upon land, the cause of action not being therefore

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complete on the navigable river, could afford no ground for the exercise of admiralty jurisdiction.

From the doctrine thus laid down by the supreme court of the United States in *The Plymouth*, it is apparent that the true question in the case now before us is whether the trespass or tort complained of was committed on land or on navigable water. If it was a trespass upon land, it is not within the admiralty jurisdiction.

It seems by the allegations of the libel that the oil depot where the injury occurred was not on, but near the river, upon the levee of the city of Keokuk; that in an extraordinary and unusual freshet or flood the water rose up to and flowed round the depot; and that in consequence of unskilful and negligent navigation, the defendant steamboat was propelled and floated with violence against the libellant's property, doing the injury complained of. The plaintiff's property was unquestionably situated upon land, and not upon the water or within the river. It would be doing violence to language to say that the oil depot in question was not upon land. Can we, then, say that because the river, in an extraordinary and unusual flood, rose up to and around the oil depot, and floated the steamer upon the plaintiff's property, the tort complained of was not upon the land? Can we say that an injury to property situated undeniably upon land, was, under the circumstances, a tort upon water? If so, all cases of collision by steamboats and other water craft with wharfs, bridges, quays, depot buildings, business houses, piers, light-houses, etc., are torts committed upon water and not upon land, and therefore within the admiralty jurisdiction; for it is evident that in every such case the water must be sufficient to reach the structure exposed to the collision, and carry the boat or vessel against it. Nay, more: it would follow from the libellant's position that if the boat or vessel should be lifted by a flood over the banks of our great rivers and carried for many miles over their vast bottoms to some man's farm, burning his

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hay-stacks, or destroying his stables, barns and their contents, the injury thus inflicted would be upon water and not upon land, and the remedy would be in admiralty. Thus the citizen would be deprived of his action at common law and his right of trial by jury, and compelled to accept such redress as a court of admiralty could give him in common with other claimants.

It was settled by the supreme court of the United States in *The Moses Taylor*, 4 Wall. 411, and *The Adam Hine*, id. 555, that the admiralty jurisdiction of the federal courts is exclusive, and therefore, when we consider the vast extent of lands sometimes flooded by these rivers with a navigable depth of water, we are somewhat startled at the idea that the common law jurisdiction over torts may be temporarily excluded. And it would appear somewhat anomalous to us that the admiralty jurisdiction should come and go with the rise and subsidence of the river, to be succeeded in its turn by that of the common law subject to the same accidents.

It seems to me, therefore, that the tort complained of in this case was not upon navigable water, but, in a true and proper sense, upon land. The water was a means or agent by which the boat was floated upon a land structure, but the injury was essentially to an erection upon land, and therefore it may be properly said that the tort was committed, or at least consummated, upon land. Exceptions sustained.

THE PACIFIC RAILROAD v. THE MISSOURI PACIFIC RAILWAY CO.

(District of Kansas. November, 1883.)

1. REMOVAL OF CAUSE — CORPORATION — PLACE OF BUSINESS. — A corporation is, for jurisdictional purposes, to be regarded as a citizen of the state by whose laws it is created, even though it has no place of business and no office or officer in such state, and has a place of business and officers in another state.

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2. **SAME—SAME—CITIZENSHIP OF CORPORATION CREATED BY THE LAWS OF SEVERAL STATES.**—A corporation created by the consolidation of six constituent corporations, three of which were Missouri corporations and three, Kansas corporations, cannot, when sued in a state court in Kansas by a citizen of Missouri, remove the cause to the federal court. Such a corporation is presumed to be composed of persons who are citizens of both said states.

McCRAEY, *Circuit Judge*.—This cause having been removed from a state court is now by agreement of counsel submitted as upon motion to remand upon facts appearing in the record and by a stipulation on file, and which are as follows:

1. The plaintiff is a corporation organized under the laws of the state of Missouri, but had at the time this suit was commenced and still has its chief place of business in the city and state of New York, and has not had for more than five years any officer, office or place of business in the state of Missouri.

2. The defendant is a consolidated corporation formed by the union of six corporations, three of which were organized under the laws of Missouri, and three under the laws of Kansas.

3. The property in controversy was the property of one of the Missouri corporations, if it is owned by the defendant at all. All the interest the consolidated company has in the property is derived from one of the Missouri corporations under the articles of consolidation. The cause was removed solely upon the ground of *citizenship*, and the question to be determined is, whether upon the foregoing facts it affirmatively appears that this is a controversy between citizens of different states?

The questions to be determined upon these facts are:

1. Can the plaintiff be held to be a citizen of New York, although created under the laws of Missouri, upon the ground that its only place of business is and has long been in the city and state of New York?

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2. If it is held that the plaintiff is a citizen of Missouri for jurisdictional purposes, can it be held, upon the facts above set forth, that defendant is a citizen of Kansas, and not of Missouri?

Upon the first question we have no difficulty. Strictly speaking, corporations cannot be citizens; and therefore, in order to hold them amenable to the federal jurisdiction on the ground of citizenship, it has been found necessary to assume, often contrary to the fact, that all the stockholders are citizens of the state by which the corporation was created. It is only by virtue of this assumption that a corporation can be said to be a citizen of any state. The presumption that all the stockholders are citizens of the state under whose laws they incorporate is a conclusive presumption, and the fact will not be inquired into. The fact may be that not one of the stockholders is a citizen of such state; but if so, it cannot be made to appear. The place of transacting business cuts no figure. The corporation, for jurisdictional purposes, is a citizen of the state by which it was created, even if all its business is transacted elsewhere, and all of its offices and places of business are outside of the state. The state may, and we think should, require all of its corporations to keep their principal office within the state, and to have officers or agents there upon whom service of process may be made. This is the law in many states. If it be the law of Missouri, the plaintiff has evidently violated it. However this may be, we are very clearly of the opinion that the plaintiff company, having been organized under the laws of Missouri, cannot become a citizen of New York, for jurisdictional purposes, by establishing its headquarters in that state and failing to keep an office in Missouri. If it continues to be a corporation at all, it is to be regarded as a citizen of Missouri. *Railway Co. v. Whitton*, 13 Wall. 270; *Railroad Co. v. Letson*, 2 How. 497; *Marshall v. R. Co.* 16 id. 314; *Railroad Co. v. Wheeler*, 1 Black,

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297; *The Covington Draw-Bridge Co. v. Shepherd*, 20 How. 232.

Upon the second question there is more difficulty. The defendant is undoubtedly a single corporation, although formed by the consolidation of six distinct corporations, three of them having been formed under the laws of Missouri, and three under the laws of Kansas. The consolidation was had under the laws of both states, the co-operating legislation of both being clearly necessary to that end. In *Railroad Company v. Harris*, 12 Wall. 65, it was said, "We see no reason why several states cannot by competent legislation unite in creating the same corporation, or in combining several pre-existing corporations into a single one." And the case of *Railroad Company v. Maryland*, 10 How. 392, is referred to as recognizing such a power.

Neither of these cases, however, presented the question with which we now have to deal. Here the validity of the consolidation is conceded; but the question is, of what state, if of any, can the consolidated company be said to be a citizen? It is created by the laws of two states. Is it a citizen of both? If not, is it a citizen of either?

We have already seen that a corporation cannot be a citizen in any proper sense of the term, and that such artificial beings are held subject to the federal jurisdiction as citizens, by resorting to the fiction that all the incorporators or stockholders are conclusively presumed to be citizens of the state creating the corporation. What becomes of the fiction when the corporation is created, as in this case, by the laws of several states authorizing the union of several corporations existing in different states? What is to be the presumption in such a case as to the citizenship of the stockholders? Manifestly it cannot be that they are all citizens of either one of the states under whose laws the consolidation was authorized. Before the consolidation there was a conclusive presumption of law that the stockholders

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in three of the original corporations which were united to form the defendant company were citizens of Missouri, and those of the remaining three, citizens of Kansas. When the six companies were united in one under the laws of both states, we are unable to see how we can say that the same stockholders can be presumed to have suddenly become citizens of one of such states. And still less can we presume, in this case, that they all became citizens of Kansas. In a word, as it seems to us, the fiction above referred to as to the citizenship of stockholders where the corporation is created by a single state cannot be applied where the corporation is created by the laws of more than one state, or if it be applied, so far from enabling us to hold that the corporation may sue or be sued as a citizen of a particular state, it leads to the opposite conclusion. We have thus seen:

1. That a corporation cannot be a citizen.

2. But where a corporation is created under the laws of a state, the courts will conclusively presume that the persons composing it are citizens of that state, and therefore will hold the corporation itself amenable to suit in the federal courts, the same as a citizen of such state.

3. Where, however, the corporation is not formed under or by virtue of the laws of a single state, but under and by virtue of the laws of several states, the presumption, if any is allowed, must be that the persons composing it are citizens of the different states under whose laws the corporation was formed; as, for example, in the present case, that the persons composing the defendant corporation are some of them citizens of Missouri, and others citizens of Kansas.

In order to prevent confusion and misconstruction of our ruling in this case, its exact nature must be kept in view. It is not a case in which a corporation created by one state has been permitted to enter the territory of another, and there engage in business. In such cases it has been held that there is no new corporation, but only added powers

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and privileges granted to an existing body, and that it remains a corporation of the state by which it was originally chartered. It refers for the law of its being to the statutes of the state by which it was originally created, although it may have obtained enlarged powers and the right to extend its operations into foreign territory from the legislation of other states. Thus, in *Railroad Company v. Harris, supra*, the corporation was originally created by the state of Maryland, and subsequently authorized to extend its operations into Virginia and the District of Columbia, by appropriate local legislation, declaring that it should have the same rights and privileges in that state and district as in Maryland. It was held that it remained a corporation of Maryland, and that no new corporation was created either in Virginia or in the District of Columbia. In *Railway Company v. Whitton, supra*, the corporation was sued as a citizen of Wisconsin, and it appeared that it had been incorporated under the laws of that state. It was insisted that there was a failure of jurisdiction, because the same corporation had also been chartered under the laws of Illinois, of which state the plaintiff was also a citizen. But the court said: "The answer to this position is obvious. In Wisconsin the laws of Illinois have no operation. The defendant is a corporation, and as such a citizen of Wisconsin, by the laws of that state. It is not *there* a citizen or corporation of any other state." In other words, as I understand this ruling, it was held that inasmuch as a distinct and separate corporation had been organized under the laws of Wisconsin alone, it was a corporation of that state, and suable as such, notwithstanding the fact that the same incorporation, under the same corporate name, may have been chartered as a corporation under the laws of another state.

But that is not the present case. Here the corporation defendant was not formed under the laws of a single state, but under the laws of two states and by a consolidation, as already explained. The consolidated company cannot point

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to the laws of either state as the source of its being. It cannot show that it has a legal corporate existence without invoking the statutes of both states and proceeding in conformity thereto. It cannot claim to be a citizen of each of said states, because, by the law of Kansas, under which the consolidation must have taken place, the several companies were authorized "to consolidate and form *one* company," so that the consolidated company must be regarded as a unit. Besides, as already stated, the presumption that the stockholders are citizens of Kansas, which is the indispensable basis of the claim that the consolidated corporation is a citizen of that state, cannot be allowed for the reasons already stated.

This case is also unlike those in which a corporation of one state is authorized to sell, assign and transfer its property and franchises to a corporation in another state. In such cases the two corporations are merged into one, and that one is the corporation which purchases the property and franchises of the other. *C., B. & Q. R'y Co. v. Antelope County*, 4 McCrary, 46.

The case of *Railroad Company v. Wheeler*, *supra*, is analogous to the one now before the court, and the ruling therein seems to us conclusive of the present question. That was a suit brought in the circuit court of the United States for the district of Indiana against Wheeler, who was a citizen of that state; and the declaration stated that the plaintiff was "a corporation created by the laws of the states of Indiana and Ohio, having its principal place of business in Cincinnati, in the state of Ohio," and that it was a citizen of the state of Ohio.

The court held that a suit in the corporate name must be regarded as, in contemplation of law, the suit of the individuals composing the corporation, and that therefore the action in that case was to be regarded and treated as a suit in which citizens of Ohio and Indiana were joined as plaintiffs in an action against a citizen of the last named state.

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"Such an action," said the court, "cannot be maintained in a court of the United States, where jurisdiction of the case depends altogether on the citizenship of the parties. And in such a suit it can make no difference whether the plaintiffs sue in their own proper names, or by the corporate name and style by which they are described." And the court further said: "The averments of the declaration would seem to imply that the plaintiff claims to have been created a corporate body, and to have been endued with the capacities and faculties it possesses by the co-operating legislation of the two states, and to be one and the same legal being in both states. If this were the case, it would not affect the question of jurisdiction in this court."

The conclusion announced was that, as the plaintiff corporation was composed of citizens of Ohio and Indiana, it could not maintain a suit in a federal court upon the ground of citizenship alone against a citizen of either of those states.

For these reasons we conclude that the case should be remanded to the state court, and it is accordingly so ordered.

James Baker, for plaintiff.

Thomas J. Portis, for defendant.

LINN v. GREEN.

(*District of Colorado. June, 1883.*)

1. EQUITY — BILL CHARGING FRAUD — INJURY RESULTING.—The rule in equity is that it is not sufficient to charge a fraud simply, but the bill must charge also some injury as the result of the fraud; but this rule does not require any considerable damage, and a slight injury as the result of a fraud will give the party injured the right to bring his action and cancel the contract.
2. SAME — FALSE REPRESENTATIONS AS TO INCUMBRANCE ON REAL ESTATE.— Where a man represents that a piece of real estate is free

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and clear of incumbrance, when in fact it is subject to incumbrance, and induces another to take it upon the belief that his representations are true, there is an injury, and a bill so charging is sufficient on demurrer.

8. **SAME — EXAMINATION OF RECORDS.**—In such a case the purchaser has a right to rely upon the representations of the grantor, and is not bound to search the records to find whether they are true or not.

McCHARY, *Circuit Judge (orally)*.—This is a bill in chancery, filed to cancel and set aside a contract and conveyance whereby the defendant sold to the complainant an interest in a mine. The bill avers that the defendant falsely and fraudulently represented to the complainant that this property was free and clear of incumbrance, and that he was induced by these representations to purchase it, and to pay for it the sum of \$1,500; that he afterwards discovered that the representations were false; that the property was not free from incumbrance, but was subject to a judgment lien of some \$700 against the defendant. Thereupon, immediately, as the bill avers, he tendered back a conveyance of the property, and demanded a return of the consideration money. There are various objections to the form of the bill, and some of them, perhaps, may be good, in strictness, if we were to consider them with very great nicety and technicality; but the only matter of substance is the question, whether there is an allegation of injury or damage here which is sufficient to give the complainant a right to relief in equity. He avers, as will be observed, that there was an incumbrance upon this property; that the representation was that it was free and clear from incumbrance. There is no allegation that the incumbrance has been enforced, or that complainant has been obliged to pay it in order to maintain his possession, or anything of that sort. The rule in equity is that it is not sufficient to charge a fraud simply, but you must charge also some injury as the result of the fraud. I think, however, that there is an injury charged here. The rule does not re-

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quire any considerable damage. A slight injury as the result of a fraud will give the party injured the right to bring his action and cancel the contract; and I think it may be said that where a man represents that a piece of real estate is free and clear of incumbrance, when in fact it is subject to incumbrance, and induces another to take it upon the belief that his representations are true, there is an injury. Real estate is not worth so much when it is incumbered as it is when it is not incumbered. The party who buys real estate upon the belief that it is free and clear from incumbrance, finding afterwards that he has been cheated in that respect, is not bound to keep it. He may return it. It is also insisted that the records were sufficient to give notice to the purchaser of the judgment liens complained of. But the rule in regard to matters of this sort is that the purchaser has a right to rely upon the representations of the grantor, and is not bound to search the records to find whether they are true or not. The demurrer to this bill will be overruled, and the defendant will answer in sixty days.

DULUTH LUMBER CO. v. ST. LOUIS BOOM & IMPROVEMENT CO.

(District of Minnesota. 1883.)

1. ST. LOUIS BOOM & IMPROVEMENT COMPANY — ACT OF 1872 OF MINNESOTA — RIGHT TO COMPENSATION.— The act of the legislature of Minnesota, of February 24, 1872, relating to the Knife Falls Boom Corporation, authorizes the St. Louis River Boom Company to receive, control, scale, deliver, and to take charge of all loose logs coming down the river within townships Nos. 49 and 50,— in fact, makes them bailees of such logs, with certain duties to perform in regard thereto; and the owners of such logs, whether they have requested the services or duties to be performed or not, are bound to compensate the company therefor.
2. SAME — CONSTITUTIONALITY OF SUCH ACT.— Such an act of the legislature is not unconstitutional.

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3. NAVIGABLE STREAMS — STATE LAWS.— Statutes passed by the states for their own uses, declaring small streams navigable, do not make them so within the meaning of any constitutional provision, treaty or ordinance of the United States.
4. NORTHWESTERN TERRITORY — ORIGINAL ACT — EFFECT OF ADMISSION OF STATE.— The original ordinance concerning the northwestern territory ceased to be of any force when congress, and a state organized out of such territory, chose to organize and admit such state into the Union.

At law.

Before MILLER and NELSON, *Judges*.

MILLER, *Circuit Justice (orally)*.— We have arrived at a satisfactory conclusion in regard to the case of the Duluth Lumber Company against the St. Louis Boom & Improvement Company, submitted to us without a jury a few days ago. The case made by the plaintiff is that it is the owner of a considerable lot of logs which came into the possession of the defendant, the boom company, and that they are entitled to the present possession of them, and have made a demand which was refused. The facts seem to be that the Duluth Lumber Company had logs above the location of the boom company, which were run down singly and irregularly, and came within the limits of the boom company's corporate territory, and were taken possession of by that company, and certain acts performed with regard to them, such as scaling them, helping them over the rocky places within the limits of the boom company's domain, and finally delivering all of them to the lumber company, except some that they retained on account of a lien for the services to the whole of them. This lien on the logs that they retained is the subject matter of controversy. It is denied by the plaintiff, the lumber company, that any statute exists authorizing the boom company to take these logs without the consent of the owner, and to do anything about them without such

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consent. It is denied that the statute confers any such authority, and it is denied that if the statute intended to confer any such authority, that it is in that respect warranted by constitutional law.

The first question, then, to be considered is whether the statute confers any such authority. The statute which governs the matter is "An act relating to the Knife Falls Boom Corporation," in Carlton county, which is found in the laws of Minnesota, c. 106, p. 454, and of the date of February 29, 1872. The statute is a long one, and I do not deem it necessary to read much of it. It creates the corporation, in the first place, and describes the geographical limits within which it shall exercise its powers. These are in townships 49 and 50, range 17, in Carlton county. It recognizes their public character, authorizes them to take the land that may be necessary for the purposes of their organization by condemnation under the power of eminent domain, and almost two-thirds of the act is devoted to the manner in which this land shall be condemned and its value ascertained and paid for. The second section of the act is the one which confers the power, and before I read it I wish to state that the argument is that where this section says that the company shall take and receive all logs coming within those two townships, it does not mean that, but it means all such logs as the owner shall desire them to boom and to receive and take charge of. That is the argument; and, as re-enforcing that argument, it is said that no statute of the kind has ever been held to include *all* logs, but that all statutes in regard to boomage provide that a way shall be kept open for parts of logs, for boats, for navigation — where the stream is navigable,— for rafts, and other things of the kind, and therefore it cannot mean *all* logs, but that a way shall be kept open for all that the owners do not desire shall go into the boom.

Now, in view of that argument there is an important proviso to this section which shows what exceptions the legisla-

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ture intended to make to the phrase "all logs" coming into that boom:

Sec. 2. "That said corporation is authorized and required to construct, maintain and keep in reasonable repair, such booms in and upon the St. Louis river, within said towns 49 and 50, of range 17, aforesaid, at such points as it may deem advisable and sufficient, to secure, receive, scale and deliver all logs that may from time to time come or be driven within the limits of the town aforesaid, and the said corporation is hereby authorized and required to receive and take the entire control and possession of all logs and timber which may be run, come or be driven within the limits aforesaid, and boom, scale and deliver the same as hereafter provided; that all logs and timber which shall be floated or run down the St. Louis river or the tributaries thereof, from points above said town, be in the possession of, and under the control of, said corporation, for the purpose of securing, scaling and delivering the same as in its acts provided."

Now, it would be very difficult to make this more comprehensive: "all the logs that come from above and in any manner come into the boom of the defendants within those townships;" but to show that it did mean all logs not expressly excepted, there is this proviso:

"That all vessels or crafts navigating said river St. Louis, and all rafts of logs or timber made up at points above the limits of town 50, aforesaid, and destined for points south of town 49, aforesaid, shall be allowed free passage upon said river, and the said corporation shall not be allowed to obstruct the channel of said river so as to interfere with the free navigation thereof as aforesaid."

Now, that is very plain, and it astonishes me that there should be any controversy about it; manifestly all loose logs set afloat in the river, coming down into that township and caught in those booms, are within the meaning of this act. All logs that are rafted up above, and all steamboats or any

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kind of vessel navigating the river, are not to be taken, but the boom men are to provide a free way for them to go through. There is no argument about it. The language is clear; all the loose logs that come into this boom are to be received and cared for; *all rafts and vessels*, and everything of the kind, shall go free; and the boom men shall provide a way for them to do it.

In opposition to this view of the subject, some language of Judge Field, in delivering the opinion of the supreme court of the United States in the case of Patterson against the boom company, is adduced. The language itself does not necessarily imply anything contrary to the views here suggested, but what he was saying was so remote, he was so little called upon to determine that question in the construction of that statute, that it could have but little weight even if that were his meaning. He was there considering a question of the value of a certain piece of land, which was condemned under a statute similar to this, for boom purposes, by a boom company, and he went on to say or argue that the owner of that land would have a right to make a boom himself, and therefore, although it was of no value for anything else but a boom, that that value must be considered as one of the elements of the damages sustained, and this question, of what the legislature meant by this statute, could have so very little to do with it, that, as a construction of the statute, it could have no binding force on anybody.

I am of the opinion, therefore, that the statute of Minnesota does authorize this St. Louis River Boom Company to receive, control, scale, deliver,— to take charge of all loose logs coming down the river within those two towns, 49 and 50. Another part of the statute, that shows that that is so, makes them liable, or implies their liability as bailees. The fact is that they are created bailees of these logs for specific purposes, and, as such bailees, they would be liable for the

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loss of the logs, or for an injury to them, as for their being burned up (if we can suppose such a thing to happen to logs in a boom), and for the unjust detention of them for a longer time than was necessary to perform the functions that they are authorized to perform. And that such is the true view of it is evidenced by the proviso to section 3: "That when the water in said river shall be so low that logs cannot be turned out of said booms, or rafted in consequence of such low stage of water, the said corporation shall not be required or held accountable for the non-delivery of any logs that may, during such time, be in such booms, or either of them, until there shall be sufficient water to enable said company to raft,"—that is one of the things they are authorized to do,—which is their duty to do,—“to raft, turn out, or deliver the same; and provided, also, the said company shall not be liable for any damage caused by any extraordinary rise of water or freshets.” They are bailees, with the absolute control of these loose logs, with certain duties to perform. And this proviso relieves them from the legal obligation of bailees, in certain contingencies.

Now, is that law unconstitutional, or is it void because the consent of the owners is neither given by express words nor by implication to the turning of their logs into this boom, or into the possession which the boom owners take of them? I am not referred to any provision of the constitution of Minnesota providing for the invalidity of such an act. Therefore I shall presume that there is no such provision.

It is hardly asserted — (although the argument goes mainly to that) — it is hardly asserted that the statute, if construed as I construe it, is void, although it is said so in the argument; and I do not see any solid foundation for such a proposition to rest upon. Here is a stream of a very peculiar character, whose only value, as a means of transportation, is that it can carry logs and lumber from above down to its mouth. That value, however, is a very great one, because

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there is a vast lumbering region on that river above these booms, and the natural and only reasonable outlet for those logs to get to a place where they can be rafted, and thence propelled in safe water, is through this river and through these booms. It may be supposed—it *must* be supposed—that the legislature had some information of the nature and character of the river, its obstructions (if there were any), its difficulties within these two townships,—because they point out these two townships specifically, and describe them; and it is only within these limits that the defendant's operations can be carried on. There are hundreds of persons interested in the business of lumbering above these two townships on that river; there are millions of feet of lumber to be cut and carried down there, and the only practical way is that they shall be floated on the waters of that river through these boom limits, and out into that part of the St. Louis bay or St. Louis river which is safe water. These persons have no community of action. They cut when they please, how much they please, and in such order as may suit themselves. They cannot carry these logs, and they cannot raft them above, because, as I understand, no raft can go over these obstructions; they must go down through these booms singly, or at least not fastened together in rafts. If they cannot be rafted, they are marked, by the provision of the statute in its express terms. It is, then, these loose logs that are set afloat by everybody, with no other mode of recognizing the property than by some artificial mark put upon them, with many owners' logs running together, and all going into this particular place,—going into a place where, as the testimony shows, it was necessary, in many instances, for somebody to turn them off of the rocks which obstructed them; to start them afloat when they were stopped by those natural obstructions; to see that they did not collect in great bodies, as they do in some of the lower rivers, and make miles and miles of obstructions that are of no use to anybody; to gather them together; to take care of them

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in this perilous part of their transit down this river. Now, for the legislature to say that you shall make a boom that will catch all these logs, that will enable you to perform a necessary duty about all these logs, and that you must do your duty with regard to all of these logs (because the owner is not sending somebody down with every log that floats); for the legislature to say that you must be careful that you touch nobody's logs that has not employed you to do it; that you shall gather together in that boom and take care of and scale and deliver to the owner no other logs than those of which the owner has requested you to do,—is to simply enjoin an impossibility. It is simply to say that no such boom shall be made. It is to say that it shall not be used, because no boom owner can do that. But the legislature has assumed that all these log owners have a common interest,—that is, that their logs should get safely through that place; that they should be identified and marked; that they should be scaled there, and that they might, if needful, be rafted there; and that they might and must be, by these boom owners, delivered to their proper owners. Now, for that service the legislature has a right to require compensation (whether the owner requests it or not) in the exercise of the duty of these boomers towards everybody that has that common interest. It has a right to say that, whether you want to pay for it or not, whether you want your logs so handled or not, since you put them into this common way, this common stream, this common mode of conveyance, and mix them, without other people's consent, with other people's logs, run them in together, without consulting anybody's interest but your own, you shall pay your reasonable share for this duty performed by the boom company.

The principle is not an uncommon nor an unusual one. It has been asserted in many cases, and no better instance can be suggested (that has often been before the courts)

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than the one suggested, on the argument, of the case of a pilot. In the sea ports of this country, and the sea ports of all nations, it has been found necessary that a body of men skilled in piloting the narrow and tortuous channels which lead to ports or harbors should exist. It is for the good of all concerned in commerce that such a body should exist. They must be paid also by the vessels or the parties who need their services and who use them, and it has been the custom and the law, from time immemorial, that this body of men shall be taken in the order in which they present themselves to the ship. A pilot is always found outside of the entrance to a harbor. He stays there, and it is his duty to be there, and his right. It is his right to be taken by that ship and paid by that ship, and if the ship refuses to take him, choosing to use a pilot of her own, the laws make her pay either whole pilotage, or half pilotage, just the same as though he had performed the service, and the reason of the rule has never been disputed. It cannot be disputed, because, in the pursuit of a common interest, for the benefit of a whole community, the parties who might have the use of the pilot, the parties for whom the service is provided, are to pay for it whether used or not.

Something is said in this case about the organic law admitting the state into the Union; about the old act for the government of the northwestern territory. We have long ago decided that the original act concerning the northwestern territory ceased to be of any force when congress and the state chose to organize and admit the state into the Union. That ordinance, then, is of no force in such a state. Nor do I think it worth while, myself, to notice the argument about the provision in the law admitting Minnesota into the Union; about all navigable streams being preserved for the use of the citizens of the different states free of toll. This is no toll for navigation, in the ordinary sense. The word "navigation," in all the statutes of the United States

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and in the constitutions and all the treaties, does not mean the running of saw-logs down a river; and that is about all that is necessary to say.

We are of the opinion that the action in this case is not sustainable, and judgment will be rendered for the defendant.

It is proper to say that many statutes of many states, for the very purpose of preserving these small streams for the use of saw-logs and various kinds of smaller water-craft, declare such streams navigable. There is hardly a stream in the western country that can float a log that has not, by statute of the state, been declared to be navigable, to prevent people from putting dams across it; but that has nothing to do with the great point of the navigability of streams of the United States concerning interstate navigation or international navigation. Those are statutes made by the states for their own uses, and they can declare, and often do declare, that a little branch is a navigable stream. That does not make it so, within the meaning of any constitutional provision, treaty or ordinance of the United States.

MANVILLE v. BELDEN MINING CO.

(District of Colorado. June, 1883.)

1. **CORPORATION — ACTION FOR MONEY HAD AND RECEIVED — CHARTER.** — A corporation, like a natural person, may be compelled to account for the benefits received from a transaction, even if it be one not enforceable by reason of the fact that its agents have no right to make it, unless it be in its nature illegal or immoral; and if the agreement under which the corporation has received and appropriated money or property cannot be enforced, it cannot be heard to refuse to account on the ground that it had no power under its charter to take it, and action may be sustained, without reference to the agreement, to recover whatever money may be justly due for the value received.

On demurrer to answer.

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McCRAEY, Circuit Judge (orally).—The plaintiff declares, first, upon a promissory note executed in the name of the defendant corporation by an agent, and as a further and separate cause of action he avers, in paragraph 3 of the complaint, that, during the year 1881 and 1882, this plaintiff, at the special instance of the defendant, advanced to said defendant, and for its use and benefit, at different times, various sums of money, amounting in the aggregate to the sum of \$3,166, no part of which has ever been paid, or the interest accrued thereon, except the sum of \$275.

To this defendant answers, among other things, that it is a corporation, and that one of its by-laws is as follows: "No debt shall be contracted for or in the name of the company, except by order of the board of directors, and then not in excess of the funds actually in the treasury."

It is averred that the debt set out in the said third paragraph of the complaint was not contracted by order of the board of directors, and that, at the time it purports to have been contracted, there was no money in the treasury of the company. To this portion of the answer the plaintiff demurs. I consider the third paragraph of the complaint as a claim for money had and received by the defendant from the plaintiff. It avers that the plaintiff advanced money to the amount of \$3,166 to said defendant, at its special instance and request, and for its use and benefit. Under this allegation it will be competent for the plaintiff to prove that he furnished, advanced or loaned money to the defendant, which the defendant received and used; and if this proof is made, it will be no answer to show the limitation of the powers of the defendant, contained in the by-laws above quoted. It is insisted that, under some peculiar provisions of the statute of Maine, under which this corporation was organized, its by-laws have the force and effect of charter provisions; that all persons must take notice of them. I do not inquire into the soundness of this claim, as, even if it be admitted, if the third paragraph of the complaint is true,

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the defendant is liable. A corporation, like a natural person, may be compelled to account for the benefits received from a transaction, even if it be one not enforceable by reason of the fact that its agents have no right to make it, unless it be in its nature illegal or immoral. If the agreement under which the corporation has received money or property cannot be enforced, an action may be sustained without reference to the agreement to recover whatever money be justly due for the value received. A corporation that has received money or property from another, and appropriated it, cannot be heard to refuse to account for it on the ground that it had no power under its charter to take it. See rule 14, p. 121, Mor. Priv. Corp., and cases cited.

The demurrer to so much of the answer as sets up the defendant's want of power as a defense to so much of the answer as is contained in the third paragraph is sustained.

Mr. Branson, for plaintiff.

H. T. Rogers, for defendant.

EX PARTE GANS.

(*Eastern District of Missouri. July, 1883.*)

1. REVENUE LAW — ASCERTAINMENT OF INFORMER'S FEES AFTER CASE IS DISPOSED OF — ACT JUNE 22, 1874 — JURISDICTION. — Where, after a final decree has been made in a smuggling case, and executed by paying a fine imposed into the United States treasury, a petition was filed in the court which had made the decree, by a party claiming to be the original informer in said case, praying for a certificate from the court as to the value of his services, for the information of the secretary of the treasury, *held*, that the court had no jurisdiction.

TREAT, *District Judge*. — On the fourteenth of June last a petition was filed by said Gans alleging that he gave the original information in a smuggling case, theretofore finally

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disposed of in this court, in which the proceeds of the property were paid into the United States treasury pursuant to the decree rendered. The prayer of the petition is in these words:

"Wherefore he respectfully claims the compensation allowed under section 4, act June 22, 1874, and prays for a certificate as is provided for in section 6 of said act."

When the attention of the court was first called to the petition it was suggested that serious propositions were involved, especially whether, after final decree, the court or judge could interfere with the discretion of the secretary of the treasury, prescribed by section 4 of the act, and whether any executive duty could be devolved on the court or judge with respect thereto. As section 4 gives to the secretary of the treasury the sole discretion as to the sum to be awarded to an informer, it is obvious that no judicial action can properly be had with respect thereto; for when a judicial decision is had, it must be final, unless reversed or modified by the appropriate court having appellate or revisory jurisdiction. There is no appeal from a decree of the court to any executive officer, nor can there be consistently with the elementary principles on which the government rests. The co-ordinate authority of the executive, legislative and judicial departments must be observed; each of which departments is confined in its action to the sphere assigned to it. That proposition is familiar to all. But section 6 says:

"That no payment, where judicial proceedings shall have been instituted, shall be made to the informer until the compensation shall have been established to the satisfaction of the court or judge having cognizance of such proceedings, and the value of his services been duly certified by said court or judge for the information of the secretary of the treasury; but no certificate of the value of such services shall be conclusive of the amount thereof."

Section 2 of the act made a sweeping repeal of all former acts as to the payment of shares of fines, etc., to informers

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and others, and requires the entire sum recovered to be paid into the treasury. Previously the courts ascertained, as essential to their decree, what portion of the sum recovered was to be paid to the United States, and what to the informer, for their respective uses. That practice compelled an alleged informer to intervene in the suit, to which he thus became a party contestant. It happened not infrequently that several persons claimed to be the original informer, and the United States disputed all their demands. Thus there was before the court, in a "suit" pending, matters essential to a right decree. The litigation proceeded in due form, and the judgment of the court was formally had. What is contemplated by section 6 is indefinite. When, in "a case wherein judicial proceedings shall have been instituted," an alleged informer intervenes, the court must dispose of his demand in some way; and, having done so, its decree is judicial, not executive, and consequently should be reviewed or overturned only in due course of further judicial proceedings.

The section devolves on the court or judge the determination of two questions: *First*, is the intervenor the original informer? and *second*, if so, what is his just compensation? But the section adds that "no certificate [by the court] of the value of such services shall be conclusive of the amount thereof."

What, then, is the supposed function of the court? If to be reviewed by the secretary of the treasury, its action is not judicial; and only judicial functions can be devolved on its constitutionality. The persons who happen to be judges may be named for other than judicial duties *eis nominibus* or *ex officiis*; but it will then be for them to determine, each for himself, whether he will accept the new office or position. The United States supreme court, as early as 1794, passed upon this general subject, and its early decisions were reviewed and affirmed in *United States v. Ferreira*, 13 How. 40.

The act of 1874 presents several anomalies in this respect.

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If the decision as to informers is committed solely to the discretion of the secretary, the duty to decide is purely executive, and the information upon which he is to act should come from executive sources. Section 6 provides that where no judicial proceedings are had, the secretary shall require satisfactory proofs; but where such proceedings shall have been instituted, he must, before payment, have the certificate of the court, by which, however, he is not bound as to compensation awarded. This provision may be intended as a check on the secretary, but what function does the court perform? These suggestions are made for the purpose of directing attention to the anomaly of confounding or confusing judicial and executive functions. Whether the decree of a court as to an informer's rights, when made in a pending case, could or could not be enforced, need not be decided.

As to the matter now before the court a distinct question arises, viz., whether a court can, after decree rendered and executed by payment of the entire fund into the treasury, take cognizance of any claim as to that fund which should have been made pending the litigation. The "case" has disappeared from the docket and this court has no further control of it. Shall it now, when no one is in court connected with the case, undertake to proceed *ex parte*, and decide that of the amount paid under the former decree a part should be taken from the treasury and paid over to petitioner. It may be that other persons than petitioner are legal informers, and would, if fairly before the court, contest his demand. When this case was pending they could have intervened, and the proceeding *in rem* would have concluded all by the decree as made; so far, at any rate, as the court is concerned. Should any other rule obtain, what limit is there to proceedings like those contemplated, either as to time or number? Is it not the wiser and truer interpretation of the statute to hold that the jurisdictional authority of the court and judge necessarily ceased when the final decree was executed? Any other ruling

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must necessarily involve strange conflicts of jurisdiction between the different departments of government, and stranger anomalies in jurisprudence. This court cannot usurp jurisdiction nor enter upon other than judicial duties. The original suit has been finally determined, and the power of this court in the premises is at an end. If a new suit is instituted to vacate the original decree, by means of which every one who has a supposed interest can intervene, the primal difficulty would remain, viz., that no suit can be brought here against the United States which would be essential to vacate a judgment in its favor.

Whatever view may be taken of the subject, there are so many anomalies connected with this application that the court must decline to entertain and act upon the petition presented. If the petitioner seeks a review of the order of this court, dismissing the petition for want of jurisdiction, a direct and practical test will occur, viz., whether the appellate court has jurisdiction, or whether, on the other hand, the application is non-judicial and consequently not cognizable by the court as such.

An order will be entered dismissing the petition for want of jurisdiction.

Breck Jones, for petitioner.

No appearance for the United States.

HIBERNIA INS. CO. v. ST. LOUIS & NEW ORLEANS TRANSPORTATION Co. and others.

(Eastern District of Missouri. July, 1883.)

1. COMMON CARRIER — BILL OF LADING — EXCEPTED PERILS — "DANGERS OF THE RIVER." — The phrase, "dangers of the river," as used in bills of lading, includes dangers arising from unknown reefs which have suddenly formed in the channel, and are not discoverable by care and skill.

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2. **TOWAGE CONTRACT—EXCEPTED PERILS.**—Where the owner of a tow-boat agrees to tow a barge containing a cargo from St. Louis to New Orleans, and to deliver the barge and cargo to a consignee at the latter place, “the dangers of navigation and other known or unknown obstacles excepted,” and said tow-boat ran said barge against a tree, which had recently fallen into the channel, and was entirely submerged and hidden from view, and the presence of which in the channel was unknown and not discoverable by care and skill on the pilot’s part, and said barge and cargo were greatly damaged, *held*, that the accident arose from an excepted peril, and that the owner of the tow-boat was not liable.

In equity.

The Babbage Transportation Company, a corporation doing business as common carrier on the Mississippi, and also engaged in towing barges for hire, contracted to transport a large amount of wheat, insured by plaintiff, from St. Louis to New Orleans,—“the dangers of the river, fire and collision excepted.” The wheat was loaded for transportation upon said company’s barge, the Sallie Pearce. The Babbage Transportation Company also contracted to tow the barge Colossal and cargo from St. Louis to New Orleans, and deliver them to a consignee at the latter place,—“the dangers of navigation and the dangers of . . . collision, . . . and other known or unknown obstacles, excepted.” Said barge and cargo were also insured by plaintiff. The steamer Means, belonging to said company, took the Sallie Pearce and several other barges in tow and proceeded down the river, but before reaching her destination she ran, together with her two starboard barges, upon a hidden reef or lump of sand in the channel with such force as to cause them to stick fast. The sudden checking of the steamer caused the lines of the starboard barges to part, and caused the Sallie Pearce to break away from the steamer, though fastened in the proper manner and with lines of usual strength. After breaking away the barge was carried by the rapid current violently against the guards of a steamboat laid up at the Missouri shore, a short distance below

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the reef, and her cargo box was broken in, and a large part of her cargo lost. Evidence was introduced by defendants, at the trial, tending to prove that the reef upon which the Means struck was in the channel; that it had been formed suddenly; that the pilot had no reason to suppose it was there; and that the boat was being handled with care and skill when the accident occurred.

The Colossal appears to have been unseaworthy at the time she started. She was taken in tow by a steamer belonging to the Babbage Transportation Company, which started down the river with her and some other barges, but on her way down, as she was nearing the mouth of the St. Francis river, and while said steamer and barges were in a very narrow channel, not over one hundred yards wide, and while floating and flanking down through said channel in the safest and most prudent manner, the steamer and her tow occupying the width of the channel, the pilot saw that there was an unusual current setting in towards the Missouri shore, just at the mouth of said St. Francis river, and that he would run very near the shore unless he backed said boat, and he immediately backed said boat, and would have passed in safety through this narrow place, but just below the mouth of said river the bank had shortly before caved in, of which no one coming down the river could have had any knowledge, and a large tree upon the land had fallen into the river, and, in passing, the stem of said barge Colossal struck the tree, which was hidden in the water from view of the pilot, and which by no act of his, or prudence or precaution on the part of the steamer, or those in charge of her, could have been avoided, and the Colossal was broken loose from the tow-boat, and floated down about a mile before said boat could overtake her, and make her fast again, and when said barge was reached she had been so much damaged and injured by her stroke against said tree, in her weak and unseaworthy condition, that she was almost full of water, and it was impossible to pump her out or do

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more than land her and make her fast to shore, which was done without loss of time, and all of her cargo saved that could be saved, but a large portion of it was unavoidably damaged and rendered worthless. Plaintiff paid the losses and became subrogated to the owner's rights against said transportation company.

Said company has since been absorbed by the St. Louis & New Orleans Transportation Company, which has succeeded to its liabilities.

O. B. Sansum and George H. Shields, for plaintiff.

Given Campbell and Thomas J. Portis, for defendant.

TREAT, *District Judge*.—As to the structure of the bill and the principles involved, the views of this court were heretofore expressed;¹ following *Case v. Beauregard*, 99 U. S. 119, and *S. C.* 101 U. S. 688. As to the shipment on the *Sallie Pearce*, the contract was that of a common carrier. As to the *Colossal* there has been some testimony offered in order to determine whether the contract was simply that of towage or that of a common carrier. The court holds that it was simply a towage contract, which is apparent, not only from the face of the written contracts themselves, but also from the facts as developed that said barge and cargo belonged to the shipper. Whether this be so or not is of no moment, in the view the court takes of the case. There were two accidents; one as to the *Sallie Pearce*, and the other as to the *Colossal*. As usual in such cases there is a great conflict of testimony. Hence the court has sought to reach a correct conclusion by examining the physical facts and circumstances connected with each disaster. The conclusion reached is that each disaster was caused by an inevitable accident, falling within the excepted perils of the river.

The bill will be dismissed, with costs.

¹ See 3 McCrary, 368; 4 id. 432.

Milne v. Douglass.

MILNE v. DOUGLASS.

(Eastern District of Missouri. July, 1883.)

1. PLEADING — DEFECT IN ALLEGATION SUPPLIED BY EVIDENCE — PARTNERSHIP. — Where, after the dissolution of a firm, one of the partners brought suit in his own name for damages suffered by the firm from a breach of a contract made with it, and the allegations of his petition as to his right to sue in his own name were vague, but it was proved at the trial of the case that the firm had been dissolved by an agreement between the partners, and that the plaintiff, as continuing partner, succeeded by the terms of the agreement to all the rights of the firm, *held*, that the evidence supplied the defect in the petition.
2. COMMON CARRIER — UNNECESSARY DELAY — DAMAGES. — Where there is unnecessary delay on the part of a common carrier in the delivery of goods which he has undertaken to transport, and the market price of such goods at the place of delivery is lower at the time of delivery than at the time when the delivery should have taken place, the carrier is liable in damages for the difference between the value of the goods at the former and their value at the latter date, at market prices.

This is a suit by John Milne against John M. Douglass, receiver of the Ohio & Mississippi Railway Company, the New York, Pennsylvania & Ohio Railway Company, the New York, Lake Erie & Western Railway Company, and the Red Cross Line of Steamships.

The plaintiff states in his petition "that he is the successor in business to the copartnership formerly existing and doing business as produce commission merchants at Dundee, Scotland, where he resides, under the firm name of Milne & Berry; that he receives payment of accounts due to, and discharges the obligations of, the said firm; that he carries on the business for his own account at old premises," etc. It appeared from the evidence that the firm of Milne & Berry had been dissolved by an agreement of the partners prior to the institution of this suit, and that by the terms of

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the agreement Mr. Milne succeeded to all the firm's rights and assumed all their obligations.

George M. Stewart and Paul Bakewell, for plaintiff.

Garland & Pollard, for defendant.

TREAT, *District Judge*.—The views of the court heretofore expressed¹ control as to the law. The action is for damages sustained in consequence of unnecessary delay by a common carrier in the delivery of goods. The court has been largely aided by counsel, through tabulation of many dates pertaining to the injury, but has still been left to ascertain values at Dundee, Scotland, at two dates, as best it could, through a mass of papers which are vague and uncertain. The first point presented is as to the right of the plaintiff to recover in his own name. The allegation is indistinct; but the defect, if any, may be considered as supplied by the proofs, viz., the right of the surviving partner to sue. An analysis as to the various shipments, and as to the times when the property shipped should respectively have reached Dundee under the circumstances, and also as to the prices at the time when the flour should have arrived and when it did actually arrive, shows that there were only six car-loads which arrived at Dundee on February 18th, instead of February 4th. From February 4th to February 18th there was no change in prices. There were two car-loads which should have arrived on February 4th, but did not arrive until March 26th or March 30th. There was a fall in the prices between those dates of one shilling per sack, making a loss of £20, which, at United States rates, amount to \$97.32, for which judgment will be entered.

¹ See 4 McCrary, 368.

Melenthin v. Keith.

MELENTHIN v. KEITH.

(District of Minnesota. June, 1883.)

1. **EJECTMENT—TITLE OF PLAINTIFF—LAND CONTRACT.**—A party who has paid part of the purchase money for land, and has made a contract with the owner that he may go into possession and cultivate the land and build thereon, and receive a deed therefor when the balance of the purchase money is paid, has sufficient title to maintain an action of ejectment.

MILLER, *Circuit Justice*.—This is in the nature of an action of ejectment, brought to the United States circuit from the state court by removal. The defendant makes a motion for judgment on the face of the papers, on the ground that the plaintiff's title is not a legal title, being simply a paper or document, which the railroad company, who had the legal title, executed to him. The strict legal title—the full title—did not inure to the party who purchased the land of the railroad; and counsel for defendant relies upon the general proposition that an action of ejectment cannot be maintained by a party where the legal title is in somebody else. That general proposition is stated by him too strongly. The legal title may be subdivided into several estates. There may be a legal title which is a fee-simple; there may be a legal title which is an estate in remainder; there may be a legal title which is a lease, the leasehold interest being in the lessee, and the title of the fee in the lessor. Any of these is sufficient, if the party is out of possession, to maintain an action of ejectment. The proposition is still stronger in most of these western states, where the language of the statute is that any party out of possession of real estate may bring an action to recover. But, conceding that in the United States courts a party can only recover on a legal title, as contradistinguished from an equitable title, I think that counsel for defendant in this case has not considered the fact that the plaintiff in this case, while he has a legal right of

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present possession, will have an equitable right to obtain the title from the railroad company when the money is all paid up. He has the legal right to the possession of that property if the vendor can give such a legal right, because the vendor has about \$200 of the purchase money, and has agreed that the plaintiff shall go into possession,—take possession of, cultivate and build, I think, is the language; something to that effect,—which necessarily implies a right of possession.

Now, taking the title of the railroad company, and the right which it has conferred on its vendee to possession, there is in this plaintiff a strict legal right of possession in this property, which does not depend upon any equitable proceedings whatever. If the defendant has a better right to the possession, he can show it; but as the papers stand I am of opinion that the contract between the railroad company (which in this motion is conceded to have a legal title) with the plaintiff in this case, which gives him the right of possession of the property, is a legal contract, and conferred the legal right of possession.

The motion in this case is, therefore, overruled.

DODGE v. MASTIN.

(*Western District of Missouri. 1883.*)

1. BANK—INSOLVENCY.—A bank is solvent, within the meaning of the constitution and statutes of Missouri, when it possesses sufficient assets to pay, within a reasonable time, all its liabilities through its own agencies; and is insolvent when, from the uncertainty of being able to realize on its assets in a reasonable time a sufficient amount to meet its liabilities, it makes an assignment, by which the control of its affairs and property passes out of its hands.
2. SAME—“IN FAILING CIRCUMSTANCES.”—The phrase “in failing circumstances,” used in the constitution and statutes, when applied to a bank, must be taken to mean a state of uncertainty whether the

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bank will be able to sustain itself, depending on favorable or unfavorable contingencies, which in the course of business may occur, and over which its officers have no control.

8. **SAME — RECEIVING DEPOSITS — KNOWLEDGE OF CASHIER — BURDEN OF PROOF.** — In an action against the president, directors, cashier or agent of a bank, under the act of April 23, 1877, for receiving a deposit knowing that the bank was insolvent or in failing circumstances, the plaintiff is only bound to prove to the satisfaction of the jury that the bank was insolvent. Upon this showing, the officers of the bank, to escape liability, must prove that they did not have the knowledge the law imputes to them, and thus overcome the law, which says they did know. The burden of proof of the want of knowledge of insolvency is on the officer sued.

At law.

KREKEL, *District Judge (charging jury).* — An explanation is, perhaps, due to you for the delay that has occurred. The questions involved in this matter are questions pertaining to the constitution and laws of the state of Missouri, and whatever may be the charges against the federal judges, they always seek to avoid a construction of the constitution and statutes of a state, because they recognize that, under our system of government, the people of a state are authorized, through their legislature, to fix their own laws; and the probabilities are that those who expound those laws are more familiar with their spirit than the federal judge can be. Although a resident among you, yet his examination of law does not lead him to the examination of the statutes of the state, but upon another field altogether; and hence, whenever we are brought face to face with the necessity of construing the constitution and statute law, the first thing we do is to look anxiously into the decisions of their own courts to learn the spirit of their laws. Under the laws of congress, and by the whole system of our government, an injunction is upon us to avoid the usurpation of anything that does not properly belong to us; and we seek, whenever there is an opportunity, to avoid the original construction of laws that belong to the state rather than to the federal gov-

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ernment. In the matter that is now presented the constitutional provision, as well as the law passed under it, is of recent date. You all recollect that the constitution under which we live is only a few years old, and the laws passed under the constitution are still younger, and have had but little time to be reviewed in the state courts. Hence, during the time that you have been delayed here I have been laboring diligently that I might arrive at a proper construction of this law, and I ask your careful attention, as this is a matter of importance.

The issue you are required to pass upon grows out of a suit between Richard Dodge and Julia R. Dodge, plaintiffs, and John J. Mastin, defendant. In this suit between these parties it is claimed by the plaintiffs that by the wrongful act of John J. Mastin they lost \$6,000, which was received on deposit in the Mastin Bank, of which the defendant Mastin was cashier, when it was known to be insolvent and in failing circumstances. In this suit here spoken of an attachment was obtained by the plaintiffs, and property supposed to belong to John J. Mastin, the defendant, was attached for the purpose of securing the debt. The laws of Missouri allow such an attachment upon plaintiffs giving bond to pay damages, if any are done, and require further that the plaintiffs, or some one for them, shall file an affidavit alleging the cause or grounds for attachment. The law requires the facts to be set out in the affidavit. The affidavit filed in this case, for the purpose of obtaining the attachment, states first that the debt sued upon was fraudulently contracted, but as this is not relied upon by the plaintiffs, nothing further may be said of or about it. The second cause for the attachment, and the one relied upon by the plaintiffs, is that the defendant, as a director, stockholder, and as cashier of the Mastin Bank, a corporation organized and existing by authority of the laws of the state of Missouri, received the sum of \$6,000 into said bank at a time when the same was in his knowledge insolvent and in a fail-

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ing condition, and by reason thereof said sum of money has been lost to plaintiffs. That is the allegation in the affidavit under which the attachment was obtained. The defendant denies the facts set out in the affidavit, and puts the plaintiffs to the proof of them; and the affirmation, on the one hand, and the denial, on the other, constitute the issues you are to determine. This is called in technical language a "plea in abatement."

You have nothing whatever to do with the original suit, and it is in no manner before you. The question for you to determine is, "Was the Mastin Bank, on the twenty-sixth of June, 1878, insolvent or not?" And, if so, "did the defendant, John J. Mastin, know it?"

The Mastin Bank was one of that class of institutions which have received the attention of the legislative department of the state of Missouri, and so important has this supervision been deemed that it has not been made a matter of legislative action simply, but the constitution of the state itself seeks to regulate them. Section 27 says: "It shall be a crime, the nature and punishment of which shall be prescribed by law, for any president, director, manager, cashier, or other officer of any banking institution to assent to the reception of deposits, or the creation of debts by such banking institution, after he shall have had knowledge of the fact that the bank is insolvent or in failing circumstances, and such officer, agent or manager shall be individually responsible for such deposits so received, and all such debts so created with his assent." That is, the constitutional provision — the constitution of Missouri itself — makes it a crime for the cashier, or other officer of a bank, to receive deposits after knowing the bank is insolvent or in failing circumstances, and further provides that the officer receiving such deposit, or creating such debt, shall be individually responsible. Thus spoke the people of Missouri in their sovereign capacity through the convention of delegates elected by them, and whose action they subsequently

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ratified at the polls. The duty then devolved upon the general assembly of Missouri to enact a law to carry this constitution into effect, and the following law was placed upon the statute book and was in force at the time the deposit in controversy was received by the Mastin Bank:

"No president, director, manager, cashier, or other officer or agent of any bank or banking institution, organized and doing business under the provisions of this article, or of any law of this state, shall receive or assent to the reception of deposits, or create or assent to the creation of any debts, by such bank or banking institution after he shall have had knowledge of the fact that it is insolvent and in failing circumstances; and it is hereby made the duty of every such officer, agent or manager of such banking institution to examine into the affairs of the same, and, if possible, learn its condition. In all suits brought for the recovery of the amount of any deposits received, or debts so created, all officers, agents or managers of any such banking institution charged with having so assented to the reception of such deposit, or the creation of such debt, may be joined as defendants or proceeded against severally, and the fact that such banking institution was so insolvent or in failing circumstances at the time of the reception of the deposit charged to have been so received, or the creation of the debt charged to have been so created, shall be *prima facie* evidence of such knowledge and assent to such deposit and creation of such debt on the part of such officer, agent or manager so charged therewith."

This act was passed on the twenty-third of April, 1877. Under the provisions of this law the plaintiff, in the first instance, must show to your satisfaction that the Mastin Bank, at the time of receiving the deposit in controversy, was insolvent or in failing circumstances. Upon such showing being made, the law implies that the officers of the bank knew of its insolvency, but provides that such officers may show that they did not in fact know of the insolvency, or

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did not assent to the deposit made. As soon as the insolvency of the bank has been established, the law imposes on the officer sued the duty to satisfy you that he did not in fact know the insolvency of the bank, or did not assent to the receiving of the deposit. The plaintiff is only bound to show that the bank was insolvent. Upon this showing being made, the officers of the bank, if they desire to escape liability, must show that they did not have the knowledge the law imputes to them, and thus overcome the law, which says they did know. This is what is meant by the words *prima facie* evidence, used in the law read to you. The burden of proof of the want of knowledge of insolvency is on the defendant. There is no dispute as to the defendant, John J. Mastin, as cashier, receiving the deposits in controversy.

So far as I remember, there is no evidence before you of any change in the financial condition of the Mastin Bank between the day of the reception of the deposits, June 26, 1878, and August 3, 1878, when the bank failed. Nor is there any evidence that John J. Mastin, the defendant, had or obtained any more or different knowledge, between the day of deposit and the day of failure, regarding the financial condition of the bank, so that whatever he knew on the third of August, 1878, he had knowledge of on the twenty-sixth of June, the day the deposit in controversy was made.

The defendant Mastin, while upon the witness stand, admitted that he knew all about the bank on the twenty-sixth of June, and for a long time prior to that time, and up to the day of the failure; that he knew the liabilities of the bank and was acquainted with its assets. I do not remember of his testifying to any change affecting the solvency of the bank, nor did any other witness testify to any change of the nature and character spoken of between the twenty-sixth of June, 1878, and August 3d, the day the bank failed.

What, then, is the effect of the failure occurring under such circumstances on the burden of the proof regarding the

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solvency or insolvency of the bank? We may fairly turn, I think, to the crimes act of the statutes of Missouri as furnishing us a guide in the determination of this question. Section 1350 of that act provides as follows:

"If any president, director, manager, cashier, or other officer of any banking institution doing business in this state shall receive, or assent to the reception of, any deposit of money or other valuable thing in such bank or banking institution, or if any such officer or agent shall create or assent to the creation of any debt or indebtedness by such bank or banking institution, in consideration or by reason of which indebtedness any money or valuable property shall be received into such bank or banking institution after he shall have had knowledge of the fact that it is insolvent or in failing circumstances, he shall be deemed guilty of larceny, and upon conviction thereof shall be punished in the same manner and to the same extent as is provided by law for stealing the same amount of money deposited, or valuable thing; provided, that the failure of any such bank or banking institution shall be *prima facie* evidence of knowledge on the part of any such officer or person that the same was insolvent or in failing circumstances when the money or property was received on deposit."

In order to arrive at the intention of the legislature in enacting laws pertaining to banks, it is proper to look at the whole of the enactments in order to discover their meaning and object. The law last quoted, taken from the crimes act, evidently proceeds upon the ground that the failure of a bank implies insolvency. The proviso proceeds upon this view, and is intended to enable an officer to show that he had in fact no knowledge of its financial condition, nor was he bound to have such knowledge by implication of law; or that, from the knowledge he had of the financial condition of the bank, he had good reason to believe the bank to be solvent. There is no pretension that the defendant Mastin had not full and complete knowledge of the financial condi-

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tion of the bank. On the contrary, his position is that, knowing all about the bank, he believed it to be solvent. The law is held to be, and I so charge you, that the Mastin Bank, having failed to meet its liabilities in the usual course of business, thereby, in contemplation of law, became insolvent, and that defendant Mastin, the cashier, knew of the insolvency when he received the deposit in controversy, and he is bound to overcome this legal presumption. There is no controversy as to the financial condition of the bank between the day of deposit and the day of its failure, being the same. If it was solvent on the day of receiving the deposit, it was solvent on the day when it closed, and *vice versa*. The defendant Mastin had the same knowledge of the financial condition of the bank on the day of receiving the deposit as on the day of failure. The law, as already stated, on account of its failure, treats the Mastin Bank as insolvent, and attributes to its cashier, the defendant, knowledge of its insolvency. The burden of proof to remove this presumption of law is upon the defendant Mastin, and he must satisfy your minds that the bank, on the day when he received the deposit, was solvent. There is no controversy as to his not having the knowledge necessary to determine the solvency or insolvency of the bank.

I will proceed next to define the meaning of the word "solvent," and the phrase "in failing circumstances," used in the statutes and constitution. In the ordinary acceptance of the term, "insolvent," when applied to a bank, means inability to meet liabilities in the usual course of business. But a bank may be solvent, and yet, from temporary causes, over which its officers have no control, suspend until these causes can be overcome. But they must be causes for which prudence and foresight cannot provide, or over which the bank or its officers had no control, or could have none. Such causes, when they do occur, are usually soon overcome. The bank again takes up its business and proceeds with it in the usual way. The failure of the First National Bank of Kan-

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sas City, Missouri, on the twenty-ninth of January, 1878, would not have been a good cause for suspension, for that could have been, and, as we have seen, was overcome by means, however, which may aid you in determining the solvency or insolvency of the Mastin Bank at the time of its failure. As much of what I shall say upon the phrase "in failing circumstances" applies also to solvency and insolvency of a bank, I pass to this branch of the case with the declaration that a bank is solvent, within the meaning of the constitution and statutes we are considering, when it possesses sufficient of assets to pay within a reasonable time all its liabilities through its own agencies, and is insolvent when, from the uncertainty of being able to realize on its assets, in a reasonable time, a sufficient amount to meet its liabilities, and therefore makes an assignment by which the control of its affairs and property passes out of its hands. The phrase "in failing circumstances," used in the constitution and statutes, when applied to a bank, must be taken to mean a state of uncertainty whether the bank will be able to sustain itself, depending on favorable or unfavorable contingencies, which in the course of business may occur, and over which its officers have no control. Thus, for instance, an individual may be said to be in failing circumstances when he is put to unusual shifts to meet his liabilities, such as borrowing money at unusual rates of interest, makes sacrifice, in the disposition of his property, which he would not do but for his condition. Such a condition of things may exist regarding a bank, and, when this is the case, a bank, like an individual, may be said to be in failing condition. The funds of banks are supposed to be ready at hand to meet the wants of commercial, trading and manufacturing communities in which they are located. Anything interfering with the availability of its funds, such as the carrying of large debts upon which nothing can be realized, except after long delays, investments in real estate which it may take time to turn into current funds,—any

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and all of these things, when they occur, may or may not tend to show whether a bank is in failing circumstances. Whether the matters here spoken of apply to the Mastin Bank you must determine from the evidence. In trying to arrive at a conclusion whether the Mastin Bank was insolvent or in failing circumstances on the twenty-sixth of June, 1878, you will bring before your mind the fact of the deposit by Mercer, treasurer, of \$212,000 in 1876, when he went out of office; the evidence of a desire of Mastin, as testified, to get on Treasurer Gates' bond, with a hope, it may be, of either retaining the funds of the treasurer then on deposit, or to obtain additional funds, even. You will recall to memory the condition on which the aid was furnished by Gates under the influence of Burnes. It will not be improper for you to consider the business the Mastin Bank engaged in or stipulated outside of a regular banking business, so as to enable you to judge what influence, if any, it might have had on the solvency or insolvency of the bank. These matters, together with all others testified to in connection with the evidence given by Mastin and others in explanation of them, should all be carefully examined by you.

In considering what weight you will give to the testimony of any witness you will take into consideration the relation in which the witness stands to the bank, what interest he has in this suit, or suits of a similiar character, pending against him on account of his connection with the bank; in fine, everything bearing on the witness, and calculated to affect or influence his testimony. Formerly the defendant was not permitted to testify in his own case, but of late years the law has allowed him to do so, leaving it to you to attach whatever of weight you see cause to attach to his testimony. You are the sole judges of the weight you will give to the matter testified to by any of the witnesses.

The duty you have to discharge is an important one. The people, by constitutional provisions, followed up by laws,

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have sought to protect the rights of the people in moneyed institutions. All this amounts to nothing unless the courts and jurors support the laws, and in proper cases enforce them. The duty may be a disagreeable one, but cannot be avoided without frittering away the spirit of the legislation upon the statutes. Do your duty under the fact and the law as given you by the court.

Scott & Taylor, for plaintiff.

Karnes & Ess, Tichenor & Warner, Pratt, Brumback & Ferry and *L. H. Waters*, for defendant.

ANDERSON v. SCOTLAND.

(*District of Minnesota. July, 1883.*)

1. PRACTICE — SETTING ASIDE JUDGMENT — ABSENCE OF COUNSEL.— The general rule is that parties and counsel will be required to attend to their cases, and be prepared when they are reached on the docket; but cases may occur when, through the absence of counsel, if injustice is done to one party or the other, it can be afterwards corrected; and if a judgment is obtained through the absence of counsel, the judgment may be set aside upon terms.

At law.

NELSON, *District Judge (orally)*.— A motion is made by counsel for the defendant to set aside the verdict of the jury, which was obtained for the reason, substantially, that the counsel were taken by surprise, and that a judgment was obtained through accident or mistake. The general rule is that parties and counsel are required to attend to their cases, and to be prepared when their cases are reached. This case was No. 1 on the docket. The *venire* was returnable on the sixth day of July, the jury was in attendance, and this case, as I said, was No. 1 on the docket and could have been tried. It

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is true that cases sometimes occur when, through the absence of counsel, if injustice is done to one party or the other, it can be afterwards corrected; and if a judgment is obtained through the absence of counsel, the judgment may be set aside upon terms. When this case was reached upon the calendar, it is true, as stated by the deponent in his affidavit, the counsel for the defendant, the presiding judge stated there would be no peremptory call of the calendar; that the justice of the supreme court of the United States, who would preside, would be in attendance on the following Monday, and that no case would be peremptorily set down for trial; but that any case that could be heard by consent of counsel, or any cases of settlement of damages, or where there would not be any appearance on the part of the defendant, could be disposed of then. It was said by counsel for plaintiff that there would be no appearance on the part of the defendant; that he had communicated with the attorneys of record for the defendant, and they had stated to him, in this language, "Go ahead." It appears that the deponent in this case, the counsel for the defendant, although not appearing as counsel of record, had been managing the case since it was removed from the state court to this court, and among the papers a stipulation appeared in which Messrs. O'Brien & Wilson, Mr. O'Brien being the deponent in this case, appeared as the attorneys for the defendant. If the court had known, or if it had been intimated to the court, that the last-named counsel were to take charge of this case, and had participated in the management of the same, the case certainly would not have been called without the consent of counsel. At the same time the attorney for the defendant should have been in attendance at the term of court, prepared, when the case was reached, either to dispose of it by trial, or to move for its continuance, or to take such steps as might be required.

In view of all the circumstances of the case, I think terms should be imposed upon counsel, and the verdict set aside.

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The verdict will be set aside on payment of the taxable costs of the term.

C. K. Davis and *H. H. Horton*, for plaintiff.

Lovely & Morgan, for defendant.

BARTLETT and others v. SMITH.

(*District of Minnesota. July, 1883.*)

1. COMPROMISE AS CONSIDERATION FOR DEED—SUIT FOR BREACH OF CONTRACT—EVIDENCE.—A. engages in option deals with B., and loses a certain sum of money therein. A. refuses to pay B., alleging it to be a gambling contract. Suit is brought thereon by B., and the jury find a verdict in favor of A. B. then takes the necessary steps to appeal the case to the United States supreme court. Pending such appeal, A. offers to settle the case and to give B. a certain quantity of land, on condition that no further steps are taken to appeal the case. A. thereupon deeds to B. certain land, making certain representations as to its quality, and B., without seeing the land, gives to A. an instrument settling the case and agreeing to proceed no further therewith. B. afterwards, on seeing the land, declares the same to be worthless, sues A. for breach of contract, and recovers a verdict. *Held*, that evidence as to the consideration of the indebtedness upon which the first suit was brought is inadmissible, and that the settlement or compromise of the litigated question is a valid consideration for the conveyance of the land.

At law.

MILLER, *Circuit Justice (charging jury)*.—The case before you is not a very complicated one, and I hope you will have very little difficulty in arriving at a speedy and satisfactory conclusion about it. It is a very ordinary action for false representations in regard to a contract for a sale of property. Whether the representations were made or not, and whether they were false or not, is for you to determine. I will lay down some of the propositions of law that are ap-

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plicable to such a case, which the long experience of courts has found to be universal in determining cases of this character.

The first thing I have to say to you is that this transaction between these parties, in which the land was conveyed by the defendant to the plaintiff, stands about the same as if it had been bought and paid for at the time. Not that it stands as if it was paid for by \$8,000 in money, but as if it was bought for any agreed sum that would be settled on. This settlement and compromise of a litigated question or of matters in litigation which have not been finished or ended is a valid consideration for the conveyance of the land; and it is immaterial in that view whether the defendant had actually a good defense or not, because there is always a question which still remains to be tried when a lawsuit is compromised, and it is to avoid the trial of that issue that the parties did compromise, and the parties had a right to make such a compromise and settle their difficulties, and in my judgment the compromise of a lawsuit is a most meritorious consideration for a promise to pay money.

The question, then, for you to consider and determine is, did Mr. Smith make certain representations to Mr. Mohr, including the letter which was read, in which he said, "I will give you good land?" Did he make such representations in regard to the nature and the character and value of that land so that Mr. Mohr had a right to rely on them, and which were false and deceptive representations? In the first place, it must appear to you that the representations were made, and you are to determine that from the testimony, and as to what these representations were.

Contrary to the view of defendant's counsel here, I permitted questions as to the value of the land and the defendant's statement of the value of that land. While I admit that where the only question in the case is, was the land of the value that the defendant represented it to be? and where it was apparent that the value, as he repre-

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sented it, was a mere matter of opinion, such a thing alone would not be a foundation for and would not justify an action, yet where other representations are made as to the quality and character and nature of the property which is subject of the litigation, and there is added to that a statement of its value by the party selling, I think that can go in as one of the representations constituting a fraud, if there had been a fraud in it. What representations, therefore, were made by Mr. Smith in regard to this tract of land, as to its character, its quality and its value, you are to consider.

The next thing to be considered is, did Mr. Mohr rely on these representations when he made this contract? Because it is not every representation that a man makes in the sale of property that he is responsible for, and must answer for in damages. For instance, if he should say of a horse which he was selling, "This horse is sixteen hands high," and the horse was present, and the other party had an opportunity of seeing the horse, and could see the mistake or falsehood, in that case the seller would not be accountable, because the buyer could have seen for himself. And so in a great many things, where the party to whom the representations are made could have an opportunity of examining for himself, it is his duty to examine for himself, and not to rely on what the other party says. There are many cases, and it is for you to say if this is one of them, in which the party makes these representations, and the other party does not seek to verify them at all. It may be too far away, or he may know nothing of the character of the thing to be sold. He may take the man at his word and say, "You say this property is so and so; you say in regard to this land that it is good arable land, and that it is good meadow land, and that it is worth ten to fifteen or twenty dollars an acre, and I take your word for it, and take your value of it upon that representation." A party has a right to do that. If the seller makes representations as to the quality and character

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of the article he is selling, and the buyer buys upon that representation, relying upon the statements of the seller, then the seller is responsible for the truth of what he says. It is not necessary that it should be absolutely true, but it is necessary that the seller should believe it to be true. If he states that he thinks it to be so and so, and it turns out to be otherwise, he is not responsible. If it is not done with an intent to deceive the party buying, and the seller does not try to deceive him with false representations, he is not responsible. If he says it is so and so, and that he believes it to be so, then he is not responsible, even if it turns out to be otherwise. So the things that you are to inquire into are: What representations did Mr. Smith make? Were these representations as to the value of the land the main feature that induced Mr. Mohr to make this contract? Did Mr. Mohr make the contract relying solely and exclusively upon those representations? Were these representations correct or incorrect? Were they true or were they untrue? Were they false or were they sound? If they were false, did Mr. Smith know or believe them to be false? Did he intend to deceive? These are the criteria by which you will determine this question.

If defendant is responsible, for what is he responsible? The price put in the deed has nothing to do with it. The question is, if you find anything at all against Mr. Smith, it will be the difference between the value of the land as he represented it to be, and the value of the land as you find it to be under the evidence. You may never come to that. I do not know that you will. But if you come to the question of damages,—as to how much the damages should be,—the rule is, you are to consider how much the property is worth, if it was just as Smith stated it to be, and what it was worth as you find it to be under all the testimony in the case.

Mowat and others v. Brown and others.

MOWAT and others v. BROWN and others.

(District of Minnesota. July, 1883.)

1. PRACTICE — CONTINUANCE — ABSENCE OF MATERIAL WITNESS. — Where a defendant, having good reason to believe that his co-defendant, who is a resident of Canada and has not been served, will be present at the trial as he has promised, in reliance on such promise has failed to take his testimony by deposition, and the testimony of the co-defendant is material, a continuance of the case may be granted to allow such testimony to be taken.

At law.

NELSON, *District Judge (orally)*.— A motion is made in this case for a continuance on account of the absence of a material witness. The material witness is the co-defendant, who was not served with process. The suit was brought against Brown & Brown, consisting of Calvin Brown and his brother. The plaintiff resides in Minneapolis, and the co-defendant not served resides in Canada. The suit is brought upon a bill of exchange, in which both parties are interested. Issue was joined in the state court of the county of Hennepin some time in February, and the case was removed to this court some time in the month of July. The co-defendant, who was not served, it appears, according to the affidavit of the party served, was in Minneapolis in the latter part of February, this year. He stated to the co-defendant that he would be on hand ready to be a witness, and to be examined as a witness for him in the case. Calvin Brown, who was served, supposed and he had reason to believe that his co-defendant, who was equally interested in the result of the controversy, would be present in attendance as a witness, as he had so stated, and in view of that fact his deposition was not taken, neither was he served with a summons to appear at this term, when he was in this state in February. I think, from all the facts stated in the case, that there is no doubt about the materiality of the tes-

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timony of the co-defendant Brown, who is now in Canada. His brother was led to believe, even as late as this month,—about the sixth or seventh of this month,—that he would be in attendance, by a correspondence that he had with him. In view of these facts, stated in the affidavit, notwithstanding objection being made by plaintiff to the continuance of this case, it will have to go over the term.

The motion for continuance is granted.

Atwater & Atwater, for plaintiffs.

A. R. Lewis, for defendants.

FARMERS' LOAN & TRUST CO. v. CENTRAL R. CO. OF IOWA.

(*District of Iowa. 1883.*)

[INTERVENTION OF A. MCKAY AND JAMES NOLAN.]

1. RECEIVER OF RAILWAY — SALE — ORDER OF CONFIRMATION. — Where a railway receiver was discharged, and the sale of the property confirmed to a newly-organized corporation, with the provision in the order of confirmation that the new company should pay all the debts of the receiver, and all claims or liabilities pending in the foreclosure case, *held*, that the new company could not be permitted, after accepting the property, to question the validity of the order.
2. SAME — EQUITY — PAYMENT OF DEBTS OF RAILWAY. — It is a proper exercise of the chancery power of the court to surrender the trust property to the purchaser, retaining jurisdiction of the original case, and retaining the authority to enforce the payment of the debts and liabilities incurred by the court's receiver in the operation of the railway.

In equity.

A. McKay and James Nolan recovered judgments for injuries received by them as employees of the receiver of the Central Railroad Company of Iowa. They each filed their petition of intervention in the original foreclosure proceed-

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ing in which the receiver was appointed, asking that their judgments be made liens upon the railway. Both cases were by agreement submitted and argued together.

John F. Lacey, for intervenors.

H. E. J. Boardman, *J. H. Blair* and *A. C. Daly*, for the Central Iowa Railway Company.

McCRABY, Circuit Judge.—The Farmers' Loan & Trust Company, trustee, foreclosed, by proceedings in this court, a mortgage upon the property and franchises of the Central Railroad Company of Iowa. Receivers were appointed to manage the property and operate the road pending the litigation, which was protracted. There was a decree of foreclosure rendered in 1875, but as the case went to the supreme court on appeal with *supersedeas*, it was not until some time in 1879 that there was a sale under the decree, and an approval and confirmation of the same by the court. In the decree confirming the sale, and directing the delivery of the property to the purchaser, the Central Iowa Railway Company, the following order appears:

“And it is further ordered that the lawful debts contracted by the receiver during the litigation, and the costs and expenses of such litigation, do constitute and are hereby made a first and paramount lien upon all said property, money, credit, and all additions thereto, to all other liens, and to the title acquired by the purchaser at the foreclosure sale, and by the conveyance to the Central Iowa Railway Company. And since it is not desirable to further continue said property under the control of the receiver, for the purpose of making net earnings for the payment of said debts, costs and expenses, and the creditors having been notified, and making no valid or satisfactory objection thereto, it is further ordered and decreed that all said claims, and all claims pending in this court, debts and liabilities, including the claims of attorneys and others, heretofore referred to special

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master Rogers, and reported on by him, and still pending on exceptions, shall be presented to the said Central Iowa Railway Company for adjustment and settlement, and the said Central Iowa Railway Company are ordered and directed to pay the said debts, costs and expenses, and the creditors entitled thereto are hereby required to accept payment thereof, with interest at the rate of seven per cent. per annum, in one year from the date hereof. And for the purpose of enforcing the payment thereof, if need be, this court will and does retain jurisdiction of said cause for the purpose of enforcing said payment, and the lien herein provided for, without other action or independent proceeding."

Undoubtedly this order is broad enough to protect the rights of the present plaintiffs, who had then pending in the foreclosure proceeding their several claims for damages resulting from personal injuries caused by the alleged negligence of the receivers. It might be doubtful whether their claims were covered by the words "lawful debts contracted by the receivers" used in the first clause of the order above quoted, but the second sentence of the order includes "all claims pending in this suit, debts and liabilities," and retains jurisdiction of the cause for the purpose of enforcing payment thereof. These plaintiffs had then filed their claims in the foreclosure suit, so that they are clearly within the terms of the order. By the statutes of Iowa they were entitled to liens upon the railroad for the amount of their damages from the time of recovering judgment. It is evident that the court was unwilling to permit a sale of the property under the decree of foreclosure so as to deprive them of all remedy before they could have a hearing. The purpose of the above-quoted order was to turn over the railroad to the new company and to permit them to take its management into their own hands, but without prejudice to the rights of these plaintiffs and others, who were then in court, seeking in the foreclosure suit to enforce claims as against the property in the hands of the receivers. They were to have just such

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rights as against the property then in the hands of the receiver and in the custody of the court as they would have had if the court had declined a decree or order of sale in advance of the hearing upon the claims of all the parties to the suit. It was to oblige the purchaser, the present respondent, that a sale and delivery were ordered in advance of the settlement of the rights of some of the parties to the suit. The court had taken control of the railroad property and franchises, and had appointed receivers to manage the business and operate the road. These receivers, through their agents, had, by negligence, injured some persons, and had by contract become indebted in their official capacities to others. They were not personally liable, but the property in their hands was liable, and could be reached by suit in form against them. That property the court was asked to turn over to the purchaser in advance of the adjustment and settlement of those claims. It would have been inequitable in the extreme if this had been done without any provision for the protection of the rights of the claimants; and it would be a strange result if we were obliged now to hold that the effort to protect such rights by the order above quoted had proved futile, and that the court had, by turning over the property, deprived the claimants in advance of a hearing of the means of enforcing their judgments when obtained.

It is, however, insisted by respondent's counsel that the *original* decree of foreclosure made no provision for these claims, and that it was not within the power of the court to embody the above-quoted order in the decree confirming the sale and ordering a delivery of the property to the purchaser. In other words, it is insisted that the order relied upon is void. It may have been voidable, but it is clearly not void. The court had jurisdiction of the parties and of the property, with power to make a conditional order of confirmation. The court was not bound to confirm the sale and relinquish control of the property without making provision for pend-

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ing claims. It had full authority to make such provision. Whether it was necessary to file a supplementary bill and allege the fact of the filing of these claims subsequently to the rendition of the decree of foreclosure, if such was the fact, is a question of no consequence now, for it is not one of jurisdiction, and the most that could be maintained is that the court erred in that respect. The respondent did not raise the question at the proper time. No appeal was entered. The order was acquiesced in by the respondent. It accepted the property; took its title under the very decree it now calls in question. It cannot now be heard upon questions of mere form, and which go only to the regularity of the proceedings.

Decree for complainants.

LOVE, *District Judge*, concurs.

MITCHELL and another v. ROBERTS, as Assignee, etc.

(*Eastern District of Arkansas. April, 1883.*)

1. MORTGAGE OF NOTES—PLEDGE.—A mortgage of personal property is a sale of the property by way of securing a debt, with a condition that if the mortgagor pays the debt the sale shall be void; a pledge contains no words of sale, but an authority, if the debt is not paid, to sell the pledge for that purpose. In the former case the title passes to the mortgagee; in the latter, the title remains in the pledgor, although possession is given to the pledgee.
2. SAME—TENDER AT COMMON LAW.—At common law a tender of the debt on the law day satisfies the condition of the mortgage, and discharges the property from the incumbrance as effectually as payment, but the debt remains and may be recovered by action at law.
3. SAME—TENDER AFTER BREACH OF CONDITION.—The general rule is that at common law a tender of the debt after breach of the condition does not operate as a discharge of the mortgage. But this rule is not uniform, and in New York, Michigan and New Hampshire a tender of the debt after maturity has the same effect as a tender on the law day, and releases the lien of the mortgage.

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4. **SAME—TENDER AFTER MATURITY—EFFECT ON LIEN.**—A tender of the debt after its maturity extinguishes the lien on personal property pledged to secure its payment, and the pledgor may recover the pledge or its value in any proper form of action, without keeping the tender good or bringing the money into court; and the pledgee may have his action for the debt.
5. **DEBT PAYABLE IN MONEY—EFFECT OF TENDER.**—A debt payable in money is never discharged by a tender. It is only where a debt is payable in specific articles of personal property that a tender operates as a satisfaction of the demand.
6. **PLEDGE FOR DEBT OF ANOTHER.**—Where the owner of property pledges it for the debt of another, he is to be treated as standing in the relation of a surety.
7. **SAME—TENDER BY PRINCIPAL DEBTOR—DISCHARGE OF SURETY.**—If the principal debtor, after the maturity of the debt, tenders the amount due to the creditor, and he refuses to receive it, the surety is discharged.
8. **SAME—WHEN CONSIDERED A SURETY.**—When property of any kind is mortgaged or pledged by the owner to secure the debt of another, such property occupies the position of surety, and whatever will discharge a surety will discharge such property.

The plaintiff B. E. Mitchell was the payee and owner of two negotiable promissory notes executed by one A. H. Blythe, each for the sum of \$1,000, which he indorsed and delivered to the Commercial Bank of Texarkana for collection. Subsequently his brother, S. T. Mitchell, borrowed \$500 on his own account from the bank, for which he executed his note, and to secure its payment assumed, as agent for B. E. Mitchell, to pledge the two Blythe notes belonging to the latter, and then held by the bank for collection. S. T. Mitchell tendered payment of his note after its maturity, and afterwards, as agent for B. E. Mitchell, demanded the surrender of the pledged notes. The defendant declined to accept the tender or deliver the notes, upon the ground that B. E. Mitchell was liable to the bank upon his indorsement of the note of one H. M. Beidler for \$350; and afterwards advertised the notes for sale to pay the note of S. T. Mitchell and the Beidler note. Thereupon the bill in this case was filed, setting up the tender, and praying for an

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injunction to restrain the sale of the pledged notes, and for a decree requiring the defendant to surrender the same to the plaintiff B. E. Mitchell. The tender was not brought into court, and the bill does not offer to pay the S. T. Mitchell note. The answer admits the tender of the amount due on the S. T. Mitchell note, and alleges it was not accepted and the pledge surrendered because B. E. Mitchell was indebted to the bank in the further sum of \$350 on his indorsement of the Beidler note. The tender was not refused because it was coupled with any condition, but because it did not include the amount of the Beidler note.

Joyner & Byrne, for plaintiffs.

O. D. Scott and J. M. Moore, for defendant.

CALDWELL, *District Judge*.—The authority of S. T. Mitchell to pledge the Blythe notes, belonging to his brother, as security for his own note of \$500, is not open to contestation. The original bill expressly admits his authority to do so; and the amended bill admits it by implication and ratifies the act, and pleads the tender of the amount due on the S. T. Mitchell note in extinguishment of the lien of the pledge.

It is equally clear the Blythe notes were not pledged as security for the Beidler note discounted to the bank by B. E. Mitchell. The answer alleges that Mitchell's liability as indorser of this note was fixed by due presentment for payment and notice of non-payment. This is denied by the replication, and there is no proof to support the answer. It is clear, therefore, upon the case as it stands, that the assignee had no right to retain the Blythe notes as a pledge for the payment of the Beidler note, because it is not shown that the bank or its assignee had any claim against B. E. Mitchell on account of his indorsement of that note or otherwise. The following, then, are the facts upon which the case must turn: The debt due the bank was the

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debt of S. T. Mitchell. The notes pledged to secure its payment were the property of B. E. Mitchell. The debtor, S. T. Mitchell, tendered to the defendant, who is assignee of the bank, the full amount of the debt after its maturity, and as the authorized agent of B. E. Mitchell demanded the return of the notes pledged as security.

Upon these facts is the plaintiff B. E. Mitchell entitled to recover the notes belonging to him, and which were pledged to secure the payment of the debt of S. T. Mitchell, without paying the latter's debt? This question is of easy solution, both upon principle and authority. The transaction was not a mortgage, but a pledge, and must be tested by the rules applicable to this class of bailments. This distinction is important. Mr. Parsons says: "The difference between a pledge and a mortgage has not until lately been strongly marked. In recent times, however, and in this country, this distinction is assuming a new importance. In all our commercial cities the pledging of personal property, especially of stocks, has been very common, and recent cases have established, or at least affirmed, rights and liabilities peculiar to such contracts, and quite different from those which attend a mortgage." 2 Pars. Cont. 112; Jones, Chat. Mortg. § 7.

In a late work the difference between a mortgage and a pledge of stocks is concisely stated. "A mortgage," says the author, "is a sale of the stock by way of securing a debt, with a condition that if the mortgagor pays the debt the sale shall be void; a pledge contains no words of sale, but an authority, if the debt is not paid, to sell the pledge for that purpose. In the former case the title passes to the mortgagee; in the latter, the title remains in the pledgor, although possession is given to the pledgee." Dos Passos, Stock Brokers, 658.

At common law a mortgage was a conveyance to the mortgagee, to be void upon condition the mortgagor paid the debt at the specified day, and to become absolute on failure so to

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pay. The mortgagee was invested with the legal title. It was not necessary to the validity of the mortgage that the possession should pass to the mortgagee, though the right of possession was in him. The mortgagee acquired the title of the property, and the mortgagor parted with the title as in the case of sale, reserving only the right to defeat the transfer and reacquire the property by paying the debt on the day named. If the mortgagor paid the debt or made a legal tender of it at the specified day, the condition of the mortgage was satisfied, and the property forever discharged from the incumbrance; but upon default of payment according to the condition, the absolute title, at law, vested in the mortgagee.

A pledge is a bailment of personal property as a security for some debt or engagement. It is completed by a delivery of the property; it does not transfer the title; it only gives the pledgee a lien upon the property for his debt, and the right to retain the possession until his debt is paid. But the non-payment of the debt, even after it is due, does not work a forfeiture of the pledge; the title remains in the pledgor until it is divested either by a foreclosure in equity or by a sale on due notice. Story, Bailm. §§ 286, 287, 308-310; Edw. Bailm. §§ 245, 279.

Where the thing pledged is a chose in action, the term "collateral security" is now most commonly applied to the transaction, and is the term used by the parties in this case; but this change of name has worked no change in the law.

At common law a tender of the mortgage debt on the law day satisfies the condition of the mortgage, and discharges the property from the incumbrance as effectually as payment; but the debt remains, and its payment may be enforced by an action at law against the mortgagor. And in pleading a tender on the law day in discharge of the condition of a mortgage, the mortgagor is not required to allege continued readiness to pay, nor need he bring the money

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into court. The tender, when made, discharged the incumbrance, not conditionally, but absolutely and forever.

"If A. borroweth a hundred pound of B., and after mortgageth land to B. upon condition for payment thereof, if A. tender the money to B. and he refuseth it, A. may enter into the land, and the land is freed forever of the condition, but yet the debt remaineth, and may be recovered by action of debt." Harg. Co. Lit. [209*b*], § 338. And upon this point the current of authorities is unbroken from Lord Coke's time to the present. Jones, Mortg. §§ 886, 891, and cases cited; *Schearff v. Dodge*, 33 Ark. 346.

But the general rule is that at common law a tender of the mortgage debt after breach of the condition does not operate as a discharge of the mortgage. The ground of this rule is that upon failure to pay at the specified day, according to condition of the mortgage, the mortgagee's title at law becomes absolute, and he cannot be required to accept the tender and restore the property. It is true that after breach of the condition the mortgagor has in equity a right to redeem, but the only effect of the tender after that time is to stop interest and protect from cost so long as it is kept good. Jones, Mortg. §§ 9, 892; Jones, Chat. Mortg. § 632; Whart. Cont. § 972; *Rowell v. Mitchell*, 68 Me. 21; *Erskine v. Townsend*, 2 Mass. 493; *Currier v. Gale*, 9 Allen, 522; *Holman v. Bailey*, 3 Metc. 55; *Shields v. Lozeau*, 34 N. J. Law, 496; *Storey v. Krewson*, 55 Ind. 397; *Perre v. Castro*, 14 Cal. 519; *Himmelman v. Fitzpatrick*, 50 Cal. 650.

But upon this point the authorities are not quite uniform. In New York, Michigan and New Hampshire a tender of payment, after maturity of a debt, has the same effect as a tender on the law day, and releases the lien of a mortgage given to secure it. Whart. Cont. § 972; Jones, Mortg. § 893; *Kortwright v. Cady*, 21 N. Y. 343; *Edwards v. Ins. Co.* 21 Wend. 467; *Moynahan v. Moore*, 9 Mich. 9; *Potts v. Plaisted*, 30 Mich. 149; *Swett v. Horn*, 1 N. H. 332; *Robinson v. Leavitt*, 7 N. H. 73.

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The ground of this ruling, in the states last mentioned, is that a mortgage is no longer what it was originally at common law — a conveyance to the mortgagee, defeasible only upon payment at the specified day; but that it is merely a security for the debt to the mortgagee, creating a lien on the property analogous to that created by a pledge of goods as a security for a debt, and that a tender after breach of the condition has the same effect as a tender made in case of a pledge of personal property. In *Jones, Mortg.*, it is said the New York rule in regard to the effect of a tender after breach of the condition does not apply in that state, nor in other states, except Michigan and Oregon, to chattel mortgages; which, it is held, do not create a lien merely, but vest the legal title in the mortgagee. *Jones, Chat. Mortg.* §§ 634, 637.

But whether a mortgage is to be regarded as retaining all its common law incidents, or as a mere security for a debt, and whether a tender of the debt after its maturity does or does not discharge the lien of the mortgage, need not be decided.

In the case at bar the question is whether a tender of the debt, after its maturity, extinguishes the lien on personal property pledged to secure its payment. Upon this question there is no conflict in the authorities. The rule is settled that a tender of the debt, for which the property is pledged as security, extinguishes the lien, and the pledgor may recover the pledge or its value, in any proper form of action, without keeping the tender good or bringing the money into court; because, like a tender of the mortgage debt on the law day, the tender having once operated to discharge the lien it is gone forever. This rule accords with justice and fair dealing. It would be an exceeding great hardship on the debtor if the creditor had the right to refuse to accept payment of the debt after it was due, and at the same time retain the debtor's property or a lien upon it for the debt. Advantageous sales would be prevented, collections delayed

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and credit lost by the inability of the debtor to free his property. In many cases debtors would be ruined before they could obtain relief by the slow process of a bill in equity to redeem. And on a bill to redeem a debtor would have to pay interest and costs down to the decree, unless he had kept the tender good. Thus the debtor, in order to protect himself against interest and costs, would be deprived of both his property and the use of his money at the pleasure of his creditor, or until the end of a chancery suit could be reached. On the other hand, a creditor who refuses to receive payment of his debt when lawfully tendered cannot complain at the loss of his security for that debt, "because it shall be accounted his own folly that he refused the money when a lawful tender of it was made unto him."

A debt payable in money is never discharged by a tender. It may operate to discharge liens and sureties, and deprive the creditor of all collateral securities, but the debt remains. It is only where a debt is payable in specific articles of personal property that a tender operates as a satisfaction of the demand. In such cases, a tender properly made discharges the debt, and the articles tendered become the property of the creditor, and afterwards are kept at his risk and expense. *Barney v. Bliss*, 1 D. Chip. (Vt.) 399; *S. C.* 12 Amer. Dec. 696; *Sheldon v. Skinner*, 4 Wend. 525; *S. C.* 21 Amer. Dec. 161; *Lamb v. Lathrop*, 13 Wend. 95; *S. C.* 27 Amer. Dec. 174, and note.

The pledgee may, therefore, notwithstanding the tender, have his action at law against the debtor for his debt; for while the tender extinguishes the lien and renders the further possession of the pledgee tortious, it does not relieve the debtor from personal liability to pay the debt. *Bacon's Abr. tit. "Bailment, B;"* *Edw. Bailm.* § 230; *Story, Bailm.* § 341; *Jones, Mortg.* § 893; *Jones, Chat. Mortg.* § 7; *Kortwright v. Cady*, 21 N. Y. 348; *Moynahan v. Moore*, 9 Mich. 9; *Potts v. Plaisted*, 30 Mich. 149.

The same rule applies to mechanics' liens for work and

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labor bestowed on personal property. Upon a tender of the amount due, the lien is discharged and the owner may recover his property, or damages for its detention, and the bailee who bestowed the labor must resort to his action to recover his money. Phil. Mech. Liens, § 511; *Ball v. Stanley*, 5 Yerg. 199; *Moynahan v. Moore*, 9 Mich. 9.

There are other grounds upon which the plaintiff B. E. Mitchell is entitled to the relief which he seeks. Where the owner of property pledges it for the debt of another, he is to be treated as standing in the relation of a surety. Edwards, Bailm. § 302; *King v. Baldwin*, 2 Johns. Ch. 554; *S. C.* 17 Johns. 384; *Strong v. Wooster*, 6 Vt. 536; *Ingalls v. Morgan*, 10 N. Y. 178; *Eddy v. Traver*, 6 Paige, 521. And it is well settled that if the principal debtor, after the maturity of his debt, tenders the amount due to the creditor and he refuses to receive it, the surety is discharged. Brandt, Suretyship, § 295; *Sears v. Van Dusen*, 25 Mich. 351; *Joslyn v. Eastman*, 46 Vt. 258; *Curia v. Packard*, 29 Cal. 194. And when property of any kind is mortgaged or pledged by the owner to secure the debt of another, such property occupies the position of surety, and whatever will discharge a surety will discharge such property. Brandt, Suretyship, §§ 21, 22; *Christner v. Brown*, 16 Iowa, 130; *Rowan Sharps' Rifle, etc. Co.* 33 Conn. 1; *Union Bank v. Govan*, 10 Smedes & M. 333; *White v. Ault*, 19 Ga. 551.

There is nothing in the decisions of the supreme court of the state in conflict with the conclusions reached. In *Schearff v. Dodge*, 33 Ark. 346, the court affirm the doctrine that a tender of the debt on the law day discharges the mortgage, but hold that a tender of the money due on a contract for the purchase of land, where the vendor retains the legal title, does not discharge the vendor's lien, and that he cannot be divested of the legal title except upon actual payment of the purchase money. In *Hamlett v. Tallman*, 30 Ark. 505, defendant was entitled to a landlord's lien, under the statute,

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on the crops, consisting of cotton, for the rent, and was in possession of the cotton, but had not commenced proceedings under the statute to enforce his lien. The rent, which was payable in money, was tendered by the purchaser of the crop from the tenant, and the landlord refusing to accept the tender the purchaser brought suit to recover the cotton, and obtain a judgment below for its value, without deduction for the rent, and without bringing the tender into court. In the opinion in the case, the difference between the effect of a tender on a creditor's right afterwards to recover his debt, and its effect on a lien to secure the debt, is not adverted to, and the decision seems to be rested solely on the well understood rules applicable in the former case, viz., that a tender is not equivalent to payment of the debt, and that its only effect is to stop interest and protect from costs so long as the tender is kept good. It is undoubtedly true that a tender does not operate as a satisfaction of a money debt, but it is equally true that it does in many cases have the effect to discharge liens and deprive the creditor of all collateral securities, and for this purpose it is the exact equivalent of payment. The case decides that the landlord's lien given by statute is not discharged by a tender of the rent, but the reasoning by which that conclusion was reached is not given, and is not very obvious, and for that reason the case as an authority must be restricted to cases on all fours, as was the case of *Bloom v. McGehee*, 38 Ark. 329, where *Hamlett v. Tallman* was followed without inquiry or discussion.

The authorities supporting the conclusions reached in the case at bar are not cited or referred to, and it is extremely plain the court did not intend to overrule them or dispute their authority.

Let a decree be entered requiring the defendant to deliver to the plaintiff B. E. Mitchell the two Blythe notes, pledged to secure the payment of the note of S. T. Mitchell.

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NOTE.¹—A pledge differs from a chattel mortgage in three essential characteristics: (1) It may be constituted without any contract in writing, merely by delivery of the thing pledged. (2) It is constituted by a delivery of the thing pledged, and is continued only so long as the possession remains with the creditor. (3) It does not generally pass the title to the thing pledged, but gives only a lien to the creditor, while the debtor retains the general property. But, as regards choses in action, the distinction that a mortgage is a transfer of the title, while a pledge is a mere lien without a transfer of title, does not hold good; for, in most cases, a pledge of choses in action can only be made effectual by a transfer of the legal title. Thus, in a pledge of negotiable paper, the title necessarily passes by a delivery of the paper if this does not require indorsement, or if it does require indorsement, then by delivery after such indorsement. To make the pledge an effectual security, it is necessary that the pledgee should have the legal title. The same is true in general as to other transfers of choses in action, such as transfers of corporate stocks. A transfer of the title to such incorporeal property is generally an essential part of the delivery of it in pledge. An absolute transfer of such property as security for a debt is a pledge, and not a mortgage. The general property may be regarded as remaining in the debtor, though the legal title be transferred to the creditor. A transfer of such property by an assignment which is not in form or substance a mortgage will constitute a pledge of it. *Wilson v. Little*, 2 N. Y. 448; *Dewey v. Bowman*, 8 Cal. 151.

It is true that there may be a mortgage of a promissory note or other chose in action, but to constitute a mortgage of it the conveyance must be made substantially in the form of a mortgage; that is, it must be a conveyance upon a condition or defeasance expressed in the instrument of conveyance, or by a separate instrument which would be construed as part of the conveyance. Thus, if a policy of insurance be assigned, and the instrument of assignment or a separate defeasance provides that the assignment shall be null and void upon the payment of the debt secured, but otherwise shall continue in full force, the transfer constitutes a mortgage and not a pledge. "The purport and substance of the contract, and the intention of the parties, as disclosed by the language they have made use of to express it, clearly indicate a sale or mortgage rather than a pledge." *Durgan v. Mut. Ben. Life Ins. Co.* 88 Md. 242, per Miller, J. An assignment, absolute in form, of a promissory note, or other contract, as collateral security, is a pledge rather than a mortgage of it. The fact that the title passes in form does not make the transaction a mortgage. A transfer of title is necessary in order that the creditor may have full control of the contract, and the means of promptly enforcing it. *Gay v. Moss*, 84 Cal. 125.

¹ From *Federal Reporter*.

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A tender of the amount due on a debt for which property is held in pledge, or for which collateral security has been given, at the time the debt is due, or afterwards, wholly discharges the lien of the pledge, and reverts the title to the thing pledged in the pledgor, so as to entitle him to maintain trover or replevin therefor. *Ratcliff v. Davies*, Cro. Jac. 244; *S. C.* 1 Bulstr. 29; *Coggs v. Bernard*, 2 Ld. Raym. 909; *S. C.* Holt, 528; *Ryall v. Rowles*, 1 Atk. 165, 167; *Haskins v. Kelly*, 1 Rob. (N. Y.) 160; *S. C.* 1 Abb. Pr. (N. S.) 68; *Ball v. Stanley*, 5 Yerg. (Tenn.) 199; *McCalla v. Clark*, 55 Ga. 53. In this respect a tender is equivalent to actual payment. A tender of a part of the amount of the debt will not have the effect to revert the title to any part of the property pledged (*Appleton v. Donaldson*, 3 Pa. St. 881); the debt must be paid as a whole, and the tender, to be effectual, must be co-extensive with the whole debt secured. *Bigelow v. Young*, 80 Ga. 121. In one respect a tender is not equivalent to payment; for, although the lien is discharged by either, the debt is not discharged by a tender, but the pledgee may still maintain his action for this.

A creditor, by refusing a tender properly made of the amount of a debt secured by a pledge, converts it to his own use. He makes it his own so far as to run the chance of any depreciation that may afterwards occur. He cannot sue for and recover the debt without making a proper allowance for the value of the pledge as it was at the time of the tender in reducing or satisfying the debt. *Griswold v. Jackson*, 3 Edw. (N. Y.) Ch. 461; affirmed, 4 Hill, 522; *Hathaway v. Fall River Nat. Bank*, 131 Mass. 14; *Hancock v. Franklin Ins. Co.* 114 Mass. 155. If in such case there be a surety of the debt, he is released; for the surety is entitled to have the security delivered up to him upon his paying the debt; and when the creditor has, by his own act, destroyed the security or rendered it valueless, or put it out of his power to give the surety the benefit of the substitution, the latter is discharged. *Griswold v. Jackson*, *supra*.

Upon the pledgee's refusal of a tender of the whole amount of the debt secured, the debtor may maintain trover for the property, and he is entitled to damages to the full value of the property, without any abatement for the amount for which the property was pledged. The creditor must resort to an action to recover the debt. The refusal of the tender discharges the lien upon the property, and places the parties in relation to the property in the same position as if the debt has been paid, and no pledge had ever existed. *Ball v. Stanley*, 5 Yerg. (Tenn.) 199.

A tender, to have the effect of discharging the lien of a pledge, must be absolute and unconditional, and must in all other ways conform to the general rules relating to the mode of making a tender. The money need not be actually produced, if the debtor has it ready and offers to

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pay it, but the creditor dispenses with the production of it in any manner; as, for instance, by expressly saying to the debtor that he need not produce the money, as he would not accept it. *Thomas v. Evans*, 10 East, 101; *Kraus v. Arnold*, 7 Moore, 59; *Hancock v. Franklin Ins. Co.* 104 Mass. 155. But a bare refusal to receive the sum offered, and a demand of a larger sum, are not enough to excuse an actual tender of the money. Thus, where a debtor met his creditor for the purpose of redeeming stock held in pledge, and the amount due upon it having been agreed upon, the debtor's agent and broker was about to fill up a check for the amount, when the creditor requested that the business should be postponed to the next day, and demanded the whole value of the stock, amounting to much more than the sum liquidated, under the pretense that he was responsible as surety for the debtor, on another and separate account, the tender was held to be ineffectual. *Dunham v. Jackson*, 6 Wend. (N. Y.) 22.

A tender, accompanied with a demand for a receipt, or a discharge of a lien, or a return of securities, is not an unconditional tender. A tender should not be accompanied with a demand for anything more than the production and delivery of any negotiable paper representing the debt which is sought to be paid. *Cass v. Higenbotam*, 27 Hun (N. Y.), 406; *Brooklyn Bank v. De Grauw*, 23 Wend. (N. Y.) 342. Moreover, the tender must at all times be kept good; that is, the debtor must constantly keep on hand the money tendered, separate from his other money, ready to pay over to the creditor whenever he might be ready to take it, and must bring the money into court. *Cass v. Higenbotam*, *supra*.

A tender need not include interest upon the debt if none was contracted for, and none has accrued by way of damages after a demand. Thus, upon a pledge of a watch by way of a sale of it for \$82, with an agreement that the seller should have it again in thirty days, upon the payment of \$87, a tender of the latter sum was held sufficient, the \$5 bonus being regarded as in lieu of interest. *Hines v. Strong*, 46 How. (N. Y.) Pr. 97; affirmed, 56 N. Y. 670.

Upon the tender of the amount of a debt for which an accommodation note is held as security, the maker of such note, being in effect a surety, is discharged. The creditor, by a tender from the principal debtor, has in his hands the means of payment, and by his refusal to accept it discharges the surety; and in an action by the creditor upon the collateral note, the maker of that need not plead the tender, or bring the amount into court. *Appleton v. Donaldson*, 3 Pa. St. 381.

LEONARD A. JONES.

United States v. Blackman.

UNITED STATES v. BLACKMAN.

(*Eastern District of Missouri. September, 1883.*)

1. **CRIMES — POSTAL SERVICE — DETAINING AND OPENING MERCHANDISE** — R. S. § 3891. — It is a criminal offense, under section 3891 of the Revised Statutes, for any one in the employ of any department of the postal service to unlawfully detain, delay or open any mailable packet of merchandise which has come into his possession, and which is intended to be conveyed by mail.

Indictment under Revised Statutes, § 3891.

MCCREARY, *Circuit Judge*. — The indictment charges that the defendant, "on the twenty-second day of March, in the year of our Lord one thousand eight hundred and eighty-three, at said district, being then and there a person employed in a certain department of the postal service of the United States, to wit, a postal clerk in the railway mail service of the United States, unlawfully did detain, delay and open a certain packet then and there containing tea, which said packet had then and there come into the possession of him, the said Blackman, and which said packet was then and there intended to be conveyed by mail, contrary to the form of the statute," etc.

The question to be determined is whether there is any statute of the United States which provides for the punishment of the offense here charged.

Section 3891 of the Revised Statutes provides for the punishment of any one employed in any department of the postal service "who shall unlawfully detain, delay or open any letter, packet, bag or mail of letters intrusted to him or which has come into his possession, and which was intended to be carried by mail," etc.

The language is taken literally from the act of June 8,

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1872, § 146 (17 St. 202), and it was there copied from the act of March 3, 1825, § 21 (4 St. 107).

It is insisted that the offense here described is that of detaining, delaying or opening a packet of letters, and that the statute does not provide for the case of the detention or opening of a package or packet of merchandise sent through the mails. In support of this view it is said that at the time the original act was passed (1825) there was no law authorizing the sending of merchandise by mail, and that, therefore, congress could not have intended to provide for such a case. There would certainly be great force in this argument if the act of 1825 had remained in force and the indictment had been found under its provisions. But that act is expressly repealed by the act of 1872, and the latter is enacted as a new, independent and original statute. I am therefore of the opinion that the meaning of the words "letter, packet, bag or mail of letters" must be determined by reference to the provisions of the law defining mailable matters which was in force when the latter act was passed — by section 130 of the act of 1872.

Mailable matter is divided into three classes, and in the third class is included "samples of merchandise not exceeding twelve ounces in weight." This definition of mailable matter is found in the same act which punishes the detention or opening of "any letter, packet, bag or mail of letters," and I am therefore of the opinion that the construction contended for by defendant's counsel is too narrow and technical. If the statute had provided for mailing only letters, then we should have understood that the packet referred to was a packet of letters; but since the statute authorized the mailing of packets of merchandise, I hold that such packets were likewise included in the criminal provision under consideration. To hold otherwise would be to assume that congress intended to provide for mailing packets both of letters and of merchandise, but did not intend to punish employees for tampering with the latter. The more reasonable construc-

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tion is that the word "packet" in the statute in question means any packet which is mailable.

The judgment of the district court is accordingly affirmed.

William H. Bliss, United States Attorney, for the Government.

Mason G. Smith, for defendant.

SMALL v. MONTGOMERY.

(*Eastern District of Missouri. September, 1883.*)

1. PRACTICE — WAIVER OF OBJECTION TO ILLEGAL SERVICE OF PROCESS.—The appearance of a defendant in a case pending in a state court, for the purpose of filing a petition for removal to a federal court, does not constitute such a general appearance as operates a waiver of defective or illegal service of process, so as to prevent his raising any objection to such service after the removal.

Demurrer to replication.

This is a case removed to this court from the circuit court of the city of St. Louis, at the instance of the defendant, who is a citizen of the state of Tennessee. After the removal the defendant filed a plea in abatement, in which he stated that prior to the institution of this suit he was indicted in the St. Louis criminal court for obtaining money under false pretenses; that he was arrested, and gave bond to appear and answer to said charge when ordered so to do by the court; that he then returned to his home in Tennessee, and did not come back to Missouri until compelled by an order of the said court, when he appeared to answer to said charge; and that while attending court to answer to said charge against him, and immediately after the case against him was dismissed, he was served by a deputy sheriff of the city of St. Louis with a copy of the complaint and summons in this case, though privileged from service of proc-

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ess at the time, and that the service on him was, therefore, illegal and void. The plaintiff, in his replication, stated that the defendant had waived any objection he might have made to said service by appearing before the St. Louis circuit court, and filing a petition for a removal of the case to this court.

M. B. Jonas and C. H. Krum, for plaintiff.

Jamison, Collins & Jamison, for defendant.

TREAT, *District Judge*.—The only question presented is whether the special appearance of defendant in the state court, whence the cause was removed, for the purpose of having said removal to this court, constitutes such a general appearance as operates a waiver of defective or illegal service, so that objection to said service cannot be here raised. Judge Drummond, in the case cited by counsel for defendant, holds that such special appearance is not a waiver of defendant's rights, nor does it operate as a general appearance, nor prevent his objecting in the federal court to the service. *Atchison v. Morris*, 11 Fed. Rep. 582.

Reference is made to the case of *Sweeney v. Coffin*, 1 Dill. 73, decided in 1870 by this court, in which it was held that under the act of 1789 this filing of a motion for removal was a sufficient appearance for that purpose without entering a general appearance in technical form.

The question arose on a motion to remand, because the record did not disclose such general appearance entered at the time of filing the petition for removal as that act required. That case is clearly distinguishable from the present in many respects. Questions of actual and of constructive service under the state law had also to be considered, and the binding effect of a valid constructive service to bring the defendant into court, although such service was not valid in federal courts. When the case was removed, the original service was held to have the same effect as before removal.

Small v. Montgomery.

Valid service is as effective as a voluntary appearance. And hence, under the act of 1789, the court ruled that, in the case then before it, proper service having been had, the filing of the petition was a sufficient compliance with the terms of that act as to appearance. No question of waiver was presented.

The case of *Wertheim v. Cont. R'y & T. Co.* 11 Fed. Rep. 689, was decided under a rule in the state court which required "all pleas in abatement . . ." to "be filed on or before the opening of the court on the day following the return day of the writ," which, in that case, was on September 13th, on which day the defendant appeared, but filed no plea in abatement. On September 22d, the defendant filed his petition for removal. After the case was removed to the federal court, the defendant filed there his plea of abatement; and the court properly held that he had, by his inaction or failure to comply with the rule stated, waived his privilege. In the case now under consideration, the petition for removal was filed before the time for pleading had expired.

The language of Judge Curtis in *Sayles v. Ins. Co.* 2 Curt. C. C. 212, seems to be broad enough to sustain the views of plaintiff's counsel; but that eminent judge put the appearance for the removal of the cause upon the same footing as pleading to the merits, whereby pleas in abatement are waived. There is, however, a marked distinction between the two procedures. The former is had merely to secure the constitutional and statutory right to have all questions heard and disposed of solely by the federal court; and the latter is by established law a waiver of all authenticated or dilatory pleas, with one exception, so that the party puts himself exclusively upon the merits of the controversy.

The act of 1875 differs from the act of 1789 as to the time of filing the petition, and says nothing as to the formal appearance entered. It has been often held that while a general appearance waives defective service, yet a special

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appearance, as in this case, has no such effect. We concur fully in the decision of Judge Drummond, *supra*. See, also, *Blair v. Turtle*, 1 McCrary, 372; *S. C.* 5 Fed. Rep. 394.

The demurrer is sustained.

McCrary, *Circuit Judge*, concurs.

DENVER & R. G. R'Y Co. v. DENVER, S. P. & P. R. Co.

(*District of Colorado. September, 1883.*)

1. RAILROADS—LOCATION UNDER ACT OF CONGRESS IN MOUNTAIN GORGES.—The location of railroads in mountain gorges, on the public domain, is subject to the second section of the act of congress, approved March 3, 1875, relating to the use of canons, passes and defiles by railroad companies, which provides that no company which locates its line through such place shall prevent any other company from the use and occupancy of the same canon, pass or defile for the purpose of its road, in common with the road first located, or the crossing of other railroads at grade.
2. SAME—CONSTRUCTION OF ACT.—This act bears upon its face the meaning that where there is a canon, pass or defile so narrow as not to admit of the passage of two roads conveniently, it may be used by two or more railroads; but only in cases of necessity can one company go upon the right of way of another for the purpose of building its road.
3. SAME—CROSS-BILL.—The company having prior right of way may enjoin intrusion thereon by another company, until facts are shown making it necessary for the second company to come on the right of way. Suit for injunction being brought, such necessity may be shown, and the right to enter upon and use such right of way may be enforced on cross-bill. The rights of the parties will be settled upon evidence by final decree, and not in a preliminary way upon motion.

In equity.

HALLETT, *District Judge (orally)*.—The plaintiff in this action located its road and built it under an act of congress approved June 8, 1872.

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In *Railway Co. v. Alling*, 99 U. S. 463, the supreme court held this act to be subject to the second section of the act of March 3, 1875, relating to the use of canons, passes and defiles by railroad companies. The act of 1875 provides that no company which shall locate its line through any such place shall prevent any other company from the use and occupancy of the same canon, pass or defile for the purpose of its road, in common with the road first located, or the crossing of other railroads at grade. This act, although the meaning is not very fully expressed, is evidently understood by the supreme court, and bears upon its face the meaning that where there is a canon, pass or defile so narrow as not to admit of the passage of two roads conveniently, it may be used by two or more. The supreme court, although they have not discussed the act at very great length, assume that the different companies are not to encroach upon each other's right of way, except there be a necessity for it. They say further:

"Where the Grand canon is broad enough to enable both companies to proceed without interfering with each other in the construction of their respective roads, they should be allowed to do so; but, in the narrow portions of the defile, where this course is impracticable, the court, by proper orders, should recognize the prior right of the Denver & Rio Grande Company to construct its road. Further, if in any portion of the Grand canon it is impracticable or impossible to lay down more than one road-bed and track, the court, while recognizing the prior right of the Denver Company to construct and operate that track for its own business, should, by proper orders and upon such terms as may be just and equitable, establish and secure the right of the Canon City Company, conferred by the act of March 3, 1875, to use the same road-bed and track after completion in common with the Denver Company."

It is not said in the act of congress that the entire right of way which may be appropriated by one company is sub-

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ject to be used by another, but only that the first appropriator shall not prevent any other company from the use of the same canon, pass or defile; and it must be clear from the language used that it is only in cases of necessity that one company can go upon the right of way of another for the purpose of building its road.

Now, whenever a controversy arises between two companies in respect to the existence of such a necessity, the fact that the canon, pass or defile is such that it is impracticable for the second company to pass through it without going upon the territory of the road first located will enter into the controversy, and it must be settled by the courts. It is perfectly plain that the first company has got a right to object to the intrusion upon its right of way by the second company until that question is settled. If it were true that this act would subject the way to the use of any other company in such a manner that the latter might go in against the objection of the first, it would be also true that the second company could demand of the first the use of its track absolutely without adjudication of the facts in any court; but it seems to me as clear as anything can be, that the first company, to locate its road through any such place as is described in this act of congress, may in the first instance, and without showing any cause whatever, object to admitting any other company into its way until the facts are shown making it necessary for the second company to come on the right of way to build its road. In that view, the circumstance that this suit was brought by the Rio Grande Company against the Denver, South Park & Pacific Company, to enjoin it from intruding on its right of way (the Rio Grande Company having first made its location and constructed its road), is not material.

As to the right of the defendant to go upon the way of the Rio Grande Company, the controversy is precisely the same as if no such suit had been brought, and upon objection by the Rio Grande Company the other had filed its bill to

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enforce its right of way under the act of congress; and it is not material that the bill was brought first by the Rio Grande Company to enjoin the other. In any question that arises respecting the right of the defendant to go upon the way of the other company to build its road, the suit is precisely in the same attitude under this cross-bill as if the bill had been first filed by that company as an original bill to enforce and secure to itself the right in these passes and canons to build its road on the same way with the Rio Grande Company.

The questions that arise in such a bill are various. It may be a question whether the party seeking to enforce such right is to encroach on the right of way of the other the distance of ten feet or twenty feet, or to lay its road-bed and track immediately parallel with the other, making it substantially a double track road, or to use the track itself of the other company. It may be a question whether the second track is to be laid above or below the first, immediately contiguous to it, or some distance from it. It must very often be a question whether the second track is to be laid upon the same side of the gulch or defile with the first or upon the opposite side; that is a very material question, for in most of these controversies where the road comes on the opposite side of the defile—upon the opposite wall of the canon—it will not affect the first road in any degree whatever, although it may be upon its right of way; it will not affect the operation or maintenance of the other road in any way whatever; but if the second road is laid above the first, in a place where the snow falls deeply, any one can see that it may affect the first very materially, as in removing the snow from the higher track it must naturally come down upon the other. And so questions that arise in a controversy of this kind, or that may arise, are as difficult of determination and as substantial in their character as any which can be brought into a court of justice. I think they are questions which are subject to adjudication in the ordi-

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nary sense. They are questions to be settled by a final decree of court. The matter is to be settled upon evidence, and not in a preliminary way upon motion.

It was suggested by counsel in argument, that it is competent for the court to allow the defendant in this suit to go on constructing this road, subject to such disposition of the matters in issue as may seem to be proper, upon the final hearing and decision of the question upon evidence, or upon whatever may be taken for evidence; but I do not think so. It would be manifestly unjust to the defendant itself to countenance the building of the road now, when it may be that the court will afterwards change its mind in respect to this matter, and require the road to be removed and built somewhere else. What would be said if we should now and here give the defendant permission to go on and build its road as it shall choose, and in six months from this time, on final hearing, declare all of it to be wrong—a mistake from the first,—and that it would be the duty of the defendant to take up its track and put it somewhere else? I do not think that any court can go on in that way. This is a matter for final decision and determination, and as such there are questions which can only be considered upon final hearing.

I do not agree that, after issue has been made in this case, the parties are entitled to the time which is prescribed by rules for taking testimony, because, I think, this case admits of only a certain kind of testimony, and the court will take the report of commissioners, if we resort to that method of proceeding, as a substitute for testimony ordinarily taken in a cause. It is a method of ascertaining facts which is regarded as more satisfactory, more intelligible, than to call inexperienced persons to testify to matters of which they have no knowledge. The matter in issue between the parties is one which requires the judgment of scientific men; and it is a question which requires the investigation and consideration of such men, and can only be determined by persons

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educated as engineers, who go upon the ground and give the necessary attention to the subject.

I think that is about all that it is necessary I should say. What was said by counsel about the hardship that rests upon the defendant may be entirely correct; I suppose it is; but I think it is not a matter for which the court can give relief by preliminary order. The plaintiff in this action has secured this right of way by going upon it and building its road under the act of congress, and I think it has a right to defend that right of way against all who may seek to convert it to their own use, until the condition of things mentioned in this act of congress is shown to exist; and no court has the power to direct any other road to go upon such way until the facts are ascertained. They are to be ascertained according to the usual methods of proceeding in courts of equity. The defendant must wait until the issue is formed upon this cross-bill, and evidence taken. It is competent,—it seems to me now (I do not wish to prejudge the matter),—it is competent for the court, after issue joined, to appoint commissioners to go upon the ground and ascertain the facts, and for the court to act upon their report.

If it is sought in the cross-bill to enjoin the Rio Grande Company from doing anything to impede the operations of the defendant in building its road by changing its track, or changing the river, or the like of that, of course that stands upon entirely different grounds. That is in the nature of an application to preserve things in the condition in which they were, until the rights of the parties shall be finally settled; and, if there is any such application as that, after the Rio Grande Company has had a short time to answer the cross-bill, we will hear what you have to say upon it. I understand the amended cross-bill was filed only yesterday. Of course, plaintiff is entitled to defend against it in some form.

E. O. Wolcott, for plaintiff.

H. M. Orahood and *H. B. Johnson*, for defendant.

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Fogg v. St. L., H. & K. R. Co. and another.

(Eastern District of Missouri. September, 1883.)

1. EQUITY — LIMITATIONS.— Although courts of equity, as a general rule, follow the statute of limitations, they do not do so when manifest wrong and injustice would result.
2. SAME — LACHES — CORPORATIONS.— Where a corporation conveyed all its assets, except its corporate franchise, to another corporation, and the latter assumed all the grantor's debts and took possession of its assets, and subsequently a creditor of the grantor, whose demand had accrued before said conveyance was executed, and was not yet barred by the statute of limitations, brought suit at law against said grantor, recovered judgment, and had an execution issued, which was returned *nulla bona*, and promptly after said return was made, but more than ten years after the original demand accrued, instituted proceedings in equity against his judgment debtor and its said grantee to force the latter to pay his demand, *held*, that the claim was neither barred by laches nor the statute of limitations.

In equity.

Exceptions to so much of the answer as set up against plaintiff's demand a bar by force of the statute of limitations and of complainant's laches. The defendants are the St. Louis, Hannibal & Keokuk Railroad Company and the St. Louis & Keokuk Railroad Company.

George D. Reynolds and James Carr, for plaintiff.

Smith & Harrison, for defendants.

TREAT, *District Judge*.— The only facts disclosed which are essential to the present inquiry are that prior to May 4, 1870, the plaintiff's demand against the second corporation named was in existence, and could have been pursued and enforced; that no suit was brought on said demand until September 21, 1881; that judgment was recovered in said suit on said demand at law on October 3, 1882; that execution thereon was duly issued and return of *nulla bona* made, March 19, 1883; that on March 4, 1873, the last named cor-

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poration, to wit, the St. Louis & Keokuk Railroad Company, conveyed to the other defendant corporation all its property and franchises, the latter assuming all the debts, liabilities and obligations theretofore made or incurred by or legally imposed upon the said St. Louis & Keokuk Railroad Company, for right of way, station grounds, ties or bridging, and other good and valuable considerations in said conveyance mentioned; that under said conveyance the first named corporation entered into possession without knowledge of plaintiff's claim, which is alleged to be on a construction account. This suit was commenced May 3, 1883.

There are many other averments and denials looking to possible aspects of the controversy which need not be now noticed. It clearly appears that the last named corporation conveyed to the former all of its assets and franchises (except its franchise of corporate existence) on March 4, 1873, on the terms stated, and that the latter took possession accordingly, and has enjoyed the same ever since. Under the admitted facts it seems that the grantee assumed all the liabilities of the grantor; but, if that be not so, by the express terms of the conveyance there was devolved on it, in equity, the payment of plaintiff's demand, when established. When one corporation conveys to another all of its assets and franchises, and the latter becomes thereby substantially, if not formally, the legal or equitable successor of the former, it must be held to take *cum onere*. A full consideration of the questions involved in said conveyance might show that it was *ultra vires* (*Thomas v. Railroad Co.* 101 U. S. 71); but if so it has been executed, and, so far as the parties thereto are concerned, their respective obligations thereunder, as between themselves, will be permitted to stand. As to third persons, creditors of the grantor, said conveyance may be fraudulent and void. However that may be, it still remains to consider whether, under the facts and circumstances stated, the plaintiff has lost his right to pursue the grantee, through laches or lapse of time.

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The general rule is not disputed that courts of equity will follow statutes of limitations in other than exceptional cases, and that creditors at large must reduce their claims to judgment, and have executions issued thereon and returned *nulla bona*, before they have any standing in equity. This follows from the principle recognized by the statutes of the United States, that no case is cognizable in equity when the plaintiff has an adequate and complete remedy at law. Judgment and a fruitless execution furnish the proper evidence that the plaintiff is remediless at law. True, a bill in equity may be upheld for a creditor at large where it shows that the plaintiff's demand rests on a lien or trust, or that an obstruction to his remedy exists which can be removed only by a decree in equity, and that a suit at law would be wholly unavailing.

The cases especially referred to and urged upon the attention of the court are those in 99 and 101 U. S. (*Case v. Beaurgard*, 119 and 688). Under the rulings of those cases it is contended that the plaintiff here could, in March, 1873, have maintained his suit in equity against the first named defendant, and hence, within the meaning of the statutes of limitation, his cause of action against the first corporation named herein should be held to have then accrued, and to have been barred in law and equity at the commencement of this suit May 3, 1883. On the other hand, it is urged that, inasmuch as the general rule in equity required plaintiff's demand to be first reduced to judgment, whereby a judgment lien would be created and a return of *nulla bona* to follow, the plaintiff's cause of action in equity did not accrue before said judgment had at law, and return of *nulla bona*.

Justice Story, in his *Equity Jurisprudence*, § 2121, says that the general rule is that the cause of action accrues when the party might bring suit. If such were the universal rule it would be necessary to determine whether the plaintiff could have brought this suit before he had reduced his claim

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at large to judgment. Each case, however, is presented to the chancellor on its own facts and circumstances; and often a demand is held stale where not pursued within a period of time short of that fixed by statute, or held not barred, although at law the statute of limitations would prevail. Although courts of equity, as a general rule, follow the statute of limitations, they do not so do when manifest wrong and injustice would be wrought.

In the case now before the court it is probable that if the plaintiff had entered upon the doubtful ground as to such cases in equity by filing his bill in 1873, being a creditor at large, and the court had held that it had jurisdiction, it would have found an issue for a jury to first determine the validity of the demand, whereby like delay would have ensued. Still, such a proceeding would then have brought home to the defendant notice that such a claim existed.

The ordinary and safer course has been pursued by first reducing the demand to judgment and exhausting the remedies at law, and then filing a bill in equity promptly thereafter. In so doing no laches to bar this action can be imputed to the plaintiff; nor can it be held that he is within the bar of the statute of limitations. Presumably the original claim on which judgment was rendered could not have existed so early as stated, otherwise the action at law would have been barred by the statute.

There are many averments and issues as to ancillary matters touching this question, which, if a different conclusion had been reached on the general facts herein stated, might have required full consideration; such as, the circumstances under which the conveyance was made and its purpose with reference to creditors, the consideration therefor, the relation of the two corporations to each other or their practical identity, etc. It must suffice that independent of such inquiries the bar set up in the answer cannot be upheld, and the exceptions must be sustained.

McCRARY, *Circuit Judge*, concurs.

Hartley v. Boynton and others.

HARTLEY v. BOYNTON and others.

(Northern District of Iowa. July, 1883.)

1. **SERVICE ON DEFENDANTS — PRESUMPTION — ENTRY OF JUDGMENT OR DECREE.**—The entry of a judgment or decree by a court, of necessity presupposes the fact that the court has found that due service has been had or an appearance has been entered.
2. **SAME — RECITAL IN DECREE.**—This presumption, however, does not prevent a party from showing, in a proper proceeding, that in fact he had not been properly served, and therefore is not bound by a given judgment or decree; and this right is not barred by a recital in the decree that the court has examined the service and finds it to be according to law.
3. **SAME — SERVICE BY PUBLICATION.**—Service of notice by publication is a purely statutory right, and is of such a nature that all of the provisions of the statute must be strictly complied with, and courts will not indulge in presumptions to supply apparent defects or failures to meet the requirements of the statute.
4. **SAME — IOWA CODE, § 2618, SUBD. 6 — AFFIRMATIVE SHOWING OF NON-RESIDENCE.**—To justify the publication of the notice under subdivision 6 of section 2618 of the Iowa code of 1873, it must appear that the action was of the character described in such subdivision, and that the defendants were non-residents of Iowa, and an affidavit must be filed showing that personal service could not be made on defendants within the state of Iowa; and where it is not shown by the record in a cause in the circuit court of the county from which the case has been removed to the circuit court of the United States, nor by the evidence *aliunde*, nor by the evidence in the case on trial in the United States court, that the defendant was a non-resident of Iowa when service was attempted to be made on him by publication, the decree entered in the case by the state court will be *held* void for want of jurisdiction.
5. **SAME — TAX SALE — REDEMPTION — NOTICE TO “UNKNOWN OWNERS” — IOWA CODE, § 894.**—As, under the facts in evidence in this case, it does not appear that on the first of October, 1877, the lands in controversy had been taxed for that year, for the reason that the several steps necessary to be completed to perfect the taxation for that year are not shown to have been completed, and the records of the county for the previous year show that such lands were taxed in the name of complainant, he was entitled to be notified, as required by section 894 of the Iowa code, that the right of redemption would expire and a deed be demanded in ninety days after completed service of the notice; and a notice by publication to “the unknown

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owners" of such lands was not sufficient, and the tax deeds executed by the county treasurer after such notice are null and void.

6. **SAME—CURATIVE ACT OF MARCH 18, 1874—IOWA CODE, § 3049—REVISION, § 3275.**—The Iowa statute of March 18, 1874, was intended to legalize the levy of the special taxes therein specified, the right to levy which had been claimed under section 3275 of the Revision, and the amendment thereto; and the adoption of section 3049 of the code of 1878 must be deemed to be an amendment to section 3275 of the Revision, within the meaning of the statute, and judgment taxes levied prior to the date of the curative act are legalized thereby.

Bill in equity.

The complainant, Isaac S. Hartley, is the owner of the record title of certain lands in O'Brien county, Iowa, which were sold at tax sale in 1874 for certain taxes as assessed thereon in 1873. Tax deeds to H. Greve were executed on the third day of January, 1878, by the treasurer of O'Brien county. At the September term, 1879, of the circuit court of O'Brien county, H. Greve brought an action to quiet his title, gave notice by publication, and procured a decree in his favor against complainant herein. The bill in the present cause is against H. Greve and his grantees, and is brought for the purpose of setting aside the decree rendered in the circuit court of O'Brien county, on the ground that the court had not jurisdiction of the cause when the decree was entered, and also to set aside the tax deeds, and to be allowed to redeem from all taxes that are legally due upon the lands in question.

Coolbaugh & Call and C. H. Clark, for complainants.

J. H. Swan, for defendants.

SHIRAS, District Judge.—The decree rendered in O'Brien circuit court is conclusive upon the rights of complainant herein, provided the court had jurisdiction of the cause when the decree was rendered. There was no personal service of the original notice in that cause, and defendant did not ap-

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pear therein. Service was made by publication only, and the question is whether this substituted service was made as provided by law, for, unless it was so made, the court had no jurisdiction, and its decree is of no force. The present action was originally brought in the circuit court of O'Brien county, Iowa, and one object of the proceeding was to have the question of the jurisdiction of the circuit court of O'Brien county, in the cause of *H. Greve v. Isaac S. Hartley et al.*, determined. The validity of that decree is therefore directly attacked, and is not brought up collaterally. The cause having been removed to this court under the act of congress providing for the removal of causes from the state to the federal tribunal, the questions at issue have to be determined by this court. In the decree rendered by the circuit court of O'Brien county it is recited that, "it appearing to the court upon an inspection of the records that the original notice herein was duly served on the above named defendants, in time and manner provided by law," etc.

It is claimed, on the part of defendants in the present cause, that this recital shows that the circuit court of O'Brien county heard and determined the question of the proper service of the original notice in that cause, and that the finding as shown by this recital is conclusive upon this court. In all cases before a judgment or decree is rendered, whether it is so recited in the record entry or not, it is presumed that the court, before rendering a judgment or decree, ascertains and determines the fact that proper service has been had, or that there is an appearance for the party; for unless it appeared that the defendant was in court, no judgment or decree could be properly rendered. The entry of a judgment or decree by a court, of necessity presupposes the fact that the court has found that due service has been had or an appearance has been entered. This presumption, however, does not prevent a party from showing, in a proper proceeding, that in fact he had not been properly served, and therefore is not bound by a given judgment or decree. This right to

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question the jurisdiction of the court, at the time the decree or judgment against him was rendered, is not barred by a recital in the decree that the court has examined the service and finds it to be according to law. If the defendant was not in fact before the court by being properly served, when the court makes examination in regard to the service, the finding of the court upon that question cannot bind the defendant. The question, therefore, of jurisdiction is open to investigation, notwithstanding the recitals in the decree.

It is admitted that the only service made in the case in O'Brien county was by publication. Service of notice by publication, being a substitute for actual personal service, is a purely statutory right, and is of such a nature that all the provisions of the statute must be strictly complied with, and courts will not indulge in presumptions to supply apparent defects or failures to meet the requirements of the statute. The code of Iowa, § 2618, provides for this class of cases, and the circumstances under which notice to defendants may be given by publication. It provides that the "service may be made by publication when an affidavit is filed that personal service cannot be made on the defendant within this state, in either of the following cases: . . . (6) In actions which relate to, or the subject of which is, real or personal property in this state, when any defendant has or claims a lien or interest, actual or contingent, therein, or the relief demanded consists wholly or partly in excluding him from any interest therein, and such defendant is a non-resident of this state, or a foreign corporation."

The action brought by H. Greve against Isaac S. Hartley *et al.*, in the circuit court of O'Brien county, comes within the provision of this sixth subdivision of section 2618. To justify the publication of the notice, it must appear that the action was of the character described in this subdivision, and that the defendants were non-residents of Iowa, and an affidavit must be filed showing that personal service could not be made on defendants within the state of Iowa. An ex-

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amination of the records of the case in question shows that the action was of the character of those included within this subdivision, and the record also shows that the affidavit to the effect that personal service could not be made on defendants within the state was properly filed. There is nothing shown upon the records of the case in O'Brien county from which it can be inferred that the defendants were at that time non-residents of Iowa,—that is to say, the records of the case fail to disclose the fact of the place of residence of defendants,—and it is not shown that any evidence thereof was submitted to that court, showing that defendants were non-residents of Iowa at that time. Now, unless the defendants were non-residents, service by publication was not permissible under the statute in that action. In the record and evidence submitted to this court I am unable to find any evidence showing that in 1879 Isaac S. Hartley was a non-resident of Iowa.

I do not determine nor rule upon the question whether the record in the original case must show that the defendants therein were non-residents in order to sustain service by publication only. What I hold is, that as it is not shown by the record in that cause, nor by evidence *aliunde*, nor by the evidence in this cause now on trial, that Isaac S. Hartley was a non-resident of Iowa in 1879, when service was attempted to be made by publication, that this court will not presume that he was a non-resident, and that, as it does not appear that he was a non-resident at that time, the service by publication cannot be upheld, because the statute only permits such service in case that defendant was a non-resident, which fact must be made to appear in some mode if such service is to be sustained. I therefore, without passing upon the other objections urged against the sufficiency of the service in the case of *Greve v. Hartley et al.*, hold, for the reason stated, that the service by publication is not sufficient to support the decree of the circuit court of O'Brien county, because it nowhere appears or is shown that Isaac S. Hartley was in

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1879 a non-resident of the state of Iowa. It not appearing, therefore, that the service of notice by publication was justified under the provisions of the statute, it follows that no service whatever had been had upon the defendants in that cause, and consequently that the circuit court of O'Brien county was without jurisdiction of the cause when the decree by default was entered in that court. Lacking jurisdiction, of course the decree is not binding, and must be held to be null and void.

2. The next question presented is whether the tax deeds executed to H. Greve, and the title derived thereunder, are valid and binding. It is urged, on behalf of complainant, that these deeds are not valid, for the reason, among others, that no notice to redeem was served upon him as required by section 894 of the code of Iowa. The only notice to redeem that was given was by publishing a notice addressed to "unknown owners," the notice containing a large number of pieces of realty which it was stated were sold to H. Greve.

The agreed statement of facts filed in this cause shows that complainant, since 1871, has been the owner of the lands in controversy, unless deprived thereof by the tax deeds under consideration; that the lands in 1875 and 1876, and the year previous thereto, were taxed in complainant's name, and that in 1877 they were taxed as unknown, or at least that no name was carried out upon the treasurer's books opposite the description of the lands. The statute requires the notice to be served upon the persons in whose name the land is taxed; the same to be served personally if the land owner is a resident of the county, and by publication if a non-resident of the county. The notice was published October 1, 1877, and the question for decision is whether the notice should have been addressed to Isaac S. Hartley, and served either in person or by publication. In other words, the question is whether these lands, on October 1, 1877, were taxed in the name of Hartley, or as unknown. This section 894 of the code of Iowa, requiring notice to redeem to be

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given to the owners of realty before applying for a tax deed, is one that must commend itself to all, and its provisions and purpose should not be narrowed by any line of construction that may tend to defeat its beneficent purpose. Parties holding tax certificates should be held to a full performance of all its requirements before they become entitled to demand a tax deed under its provisions. The object of the section in requiring notice to be served upon the person in possession of the land, and also upon the person in whose name the same is taxed, clearly is to provide that the owner of the land may be notified of the fact that a tax title is maturing in order that he may have ninety days in which to protect his rights and redeem the land. It is therefore made the duty of the holder of a tax sale certificate to give notice to the person in possession, and to the person in whose name the land is taxed, that the right of redemption will expire, and a deed be demanded in ninety days after complete service of the notice. This provision of the statute must be observed in good faith by the holder of the tax certificate before he becomes entitled to demand a tax deed.

In the case now before the court it is shown that the title of the lands in dispute had been in complainant's name upon the records of the county since 1871; and for several years, including 1875 and 1876, the lands were taxed in his name. Now, on the first day of October, 1877, was there any reason why the holder of the tax certificate could not readily ascertain the name of the party to whom notice was to be given? He published notice under the caption of "Unknown Owners," and justifies so doing by claiming that the lands in 1877 were taxed as unknown.

The question for decision is whether, on the first of October, 1877, these lands were taxed to any person by name. It will be remembered that the object of the statute in requiring service upon the person in whose name the land is taxed is to provide for notice to the probable owner of the land. For the purpose of giving notice under this section

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of the code a completed taxation in any one year holds good as a designation of the person to whom notice is to be given until the lands are again taxed at a subsequent time. As I have already said, these lands in 1876 were taxed in the name of Isaac S. Hartley, and thus he was designated as the person upon whom service must be made under the statute, and this designation held good until by a subsequent taxation of the land some other party should be shown to be the person to be notified, or else, by being taxed as unknown, the necessity of giving notice might be waived. If, on the first day of October, 1877, these lands were taxed to unknown owners, then notice to complainant by name would not be required. By the taxation of property is meant the several steps of listing the same, assessing the values, equalizing values by the proper boards of equalization, fixing the rate of levy by the board of supervisors, which is done in September; the completion of the tax list by the auditor, under section 839; and the delivery of the completed list by the auditor to the county treasurer on or before the first day of November.

It is not claimed or shown that these several proceedings had all been had and completed on the first day of October, 1877, and hence in my judgment it cannot be said that on that day the lands were taxed to "unknown owners." The county auditor has express statutory authority for correcting any clerical or other error in the assessment or tax book; and hence, it should be made to appear to him that lands entered on the list to unknown owners should be entered and taxed to A. B., I see no reason why it would not be his duty to make the correction. Hence it does not follow that because lands may be returned on the assessor's list under the head of "Unknown Owners," that when the completed tax list is delivered by the auditor to the treasurer it will show the lands taxed to unknown owners. That list may show them taxed to the real owner by his proper name. Under the facts in evidence in this cause it does not appear that on the

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first of October, 1877, these lands had been taxed for that year, for the reason, as already stated, that the several steps necessary to be completed, to perfect the taxation for that year, are not shown to have been completed. Hence, as the records of the county then stood, the lands were taxed in the name of Isaac S. Hartley, and the notice of the expiration of the time for redemption should have been given to him, which it is admitted was not done. Hence it follows that the county treasurer had no legal right to execute the tax deeds of the land in question, because the right of redemption of the owner had not been terminated by the giving of the notice required by the statute.

These deeds must, therefore, be held void.

3. It is claimed, on the part of complainant, that a part of the taxes levied on the lands, and for which the same were sold, are illegal, in that the amount of the levy is in excess of the rate which the board of supervisors could lawfully levy, and that complainant should not be required to pay the amount of these taxes in making redemption from the tax sales. It is admitted by counsel that the legality of the taxes depends upon the question whether the curative act passed by the legislature under date of March 18, 1874, can be held to apply to the levies in question; the point being made that the code of 1873, which was in force when the levies were made, repealed section 3275 of the Revision, and that the curative act of March 18, 1874, only applies to taxes levied under section 3275 of the Revision and the amendment thereto. Curative acts of the nature of the one in question should be fairly construed. The true intent of this act of 1874 is to legalize the levy of the special taxes therein named; that is to say, taxes levied to pay judgments rendered against various counties, school districts, and other municipal corporations, the right to levy which had been claimed under section 3275 of the Revision and the amendments thereto.

In my judgment the adoption of section 3049 of the code

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of 1873 must be deemed to be an amendment to section 3275 of the Revision, within the meaning of the act of March 18, 1874, and the judgment taxes levied in O'Brien county prior to the date of the curative act are legalized by that act.

There will be, therefore, a decree in this cause in favor of complainant, holding the decree in the circuit court of O'Brien county, in the cause of *H. Greve v. Isaac S. Hartley et al.*, null and void; also setting aside and annulling the tax deeds issued by the treasurer of O'Brien county under date of January 3, 1878, and declaring that complainant is entitled to redeem the lands from the tax sales made thereof, said redemption to be made within ninety days from this date; and that if redemption be not made, that the holder or holders of the tax certificates be entitled to demand and receive tax deeds for said lands from the treasurer of O'Brien county, as provided by law; complainant being also entitled to a decree for costs.

MOSHER v. ST. LOUIS, I. M. & S. R'Y CO.

(*Eastern District of Missouri. September, 1883.*)

1. COMMON CARRIER — PURCHASER OF RAILROAD TICKET BOUND TO COMPLY WITH ITS CONDITIONS — AUTHORITY OF CONDUCTOR. — Where A., a railway company, sold a ticket to B., good for a trip from C. to D. over A.'s road and E.'s road, with which A.'s connected, and also good for a return trip on condition that B. should, within a specified time, identify himself to E.'s authorized agent at D., and have his ticket dated and signed in ink and stamped by such agent, and B., in a suit against A. for damages, set forth said facts in his petition, and alleged that within the specified time he presented himself and said ticket "at the business office and depot" of E. at D., before the time of departure of E.'s train for C. which he desired to take, and offered to identify himself and have said ticket stamped, etc., "and in all manner fully complied with the terms of said contract on his part," but that the defendant and E. failed to have an agent present then and there at said office for that purpose at any time between

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the time the plaintiff so presented himself and his ticket and the arrival of the train for C.; that B. proceeded on said train, however, and explained the said circumstances to the conductor, who agreed to permit him to ride as far as X., an intermediate point, but subsequently, instead of so doing, ejected him from the train,—*held*, on demurrer, that no sufficient excuse for B.'s non-compliance with the conditions of his ticket was given; that said conductor had no power to pass upon B.'s excuses; and that, therefore, the petition did not state a cause of action.

At law.

TREAT, *Circuit Judge*.—The petition avers that plaintiff had a railroad ticket issued by defendant, with proper coupons, for his transportation from St. Louis to Hot Springs within five days, and return at any time within eighty-five days from date of the ticket, “by identifying himself as the original party to said contract, and purchaser of the ticket containing it, to the satisfaction of, and to the authorized agent of, the Hot Springs Railroad at Hot Springs, Arkansas, within eighty-five days from said date of entering into said contract, and after said contract or ticket had been officially signed and dated in ink, and duly stamped by said agent at Hot Springs, Arkansas, and to be good five days from the latter date to return to said city of St. Louis.”

In accordance with the terms of said contract, plaintiff was transported as a passenger from St. Louis to Hot Springs, and within the specified eighty-five days, desiring to return to St. Louis, “presented himself and said contract or ticket at the business office and depot of said Hot Springs Railroad at said Hot Springs, before the time of departure of its train for St. Louis, and offered to identify himself as the original party to said contract and purchaser of said ticket, to the satisfaction of, and to the authorized agent of, said Hot Springs Railroad at said Hot Springs, Arkansas, for the purpose of having the same officially signed and dated in ink, and duly stamped by said agent, and in all manner fully

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complied with the terms of said contract on his part; but the defendant and said Hot Springs Railroad failed to have an agent present then and there at said business office and depot of said Hot Springs Railroad, for that purpose, at any time between the time the plaintiff so presented himself and said contract and ticket at said business office and depot at Hot Springs, and the arrival of the train that plaintiff desired to take going to St. Louis," etc.

Plaintiff proceeded on the train, however, and on representing to a conductor the foregoing facts and showing his ticket, the latter agreed to take him on the train to Little Rock, and have said ticket there signed, dated and stamped by the agent of the defendant, and then transport the plaintiff to St. Louis, but instead of so doing, expelled the plaintiff from the train, refusing to transport him to Little Rock under said contract, by reason of which wrongful acts plaintiff has been damaged to the extent of \$10,000.

Such were the important averments of the petition, and they show that the plaintiff was expelled from the car for failure to present the needed ticket. It is evident that he knew the ticket was irregular, and on its face showed his non-compliance with the terms of the contract. The conductor could not substitute himself for the agent named by whom the identity was to be ascertained, etc., nor was it for him to pass upon the sufficiency of the excuse offered. Indeed, the petition itself does not disclose at what time he presented himself with his ticket at the business office and depot of the Hot Springs Railroad for the purpose stated; nor that the time and place were proper and reasonable. It seems that he had not the required ticket, nor did he offer to pay the fare due. There is nothing in the petition to show that he had complied with his express contract, or attempted to do so in a fair and reasonable manner, even if a proper effort on his part would avail. It is evident that he cannot recover on the contract, because he had failed to comply with its terms; and he cannot recover for the alleged

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trespass, because the conductor rightfully expelled him from the cars for failure to present a proper ticket.

The principles on which this ruling on the demurrer to the petition is based will be found fully stated and discussed in 6 Amer. & Eng. R'y Cas. 322 *et seq.* and notes.

Demurrer sustained.

E. P. Johnson and Wm. M. Eccles, for plaintiff.

Bennett Pike, for defendant.

CUNNINGHAM v. CHICAGO, M. & ST. P. R. CO.

(District of Minnesota. July, 1883.)

1. **PERSONAL INJURY — CONTRIBUTORY NEGLIGENCE.**—A., in the employ of a railroad company as yardman, while engaged in his occupation as such, attempted to board the switch-engine, with which he was working, by standing in the middle of the track and stepping on the rear foot-board of said engine, which was approaching him, tender first, at a rate of from one to three miles an hour, but, in the attempt, fell, was run over by the engine, and died from the effect of his injuries. The hand-rail on the rear end of the engine, which was approaching the deceased, had been torn off the previous night, and had not been replaced, and the rear foot-board of the engine in question was partly broken at one end. Suit was brought by the administratrix, the mother of the deceased, to recover the sum of \$5,000. The jury returned a verdict for \$1,000 in favor of the plaintiff. Before the jury left the jury-box a motion was made by the defendant to set aside the verdict. *Held*, that the act of so attempting to board the engine was clearly a case of gross contributory negligence on the part of the deceased, and the verdict should be set aside.
2. **SAME — VOLUNTARILY ASSUMING A POSITION OF DANGER.**—If a man voluntarily and unnecessarily puts himself into a dangerous position, when there are other positions that he may take, in connection with the discharge of his duty, that are safe, he cannot recover damages for that injury to which he has contributed by his own negligence.

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At law.

This is an action brought by Mrs. Mary Cunningham to recover the sum of \$5,000 damages for the death of Thomas McCarthy, the son of this plaintiff, which was caused by his being run over by a switch-engine, while he was in the employ of this defendant as such yardman. Defendant sets up contributory negligence as a defense.

The complaint alleges that the deceased was engaged in the employ of the defendant as yardman, in the city of St. Paul, and that it was necessary for him as such yardman to get on and off cars and engines while the same were in motion; that the engines in use for such yard business are what are called switch-engines, and are usually provided with foot-boards and hand-railings for the use and safety of the employees working around them; that on the first day of December, 1880, while the deceased was so employed, the said engine was so unskilfully, negligently and improperly constructed and operated by defendant that the said John McCarthy was thrown from and run over by said engine, and received such injuries as resulted in his death on the tenth of December, 1880; that at the time of the accident the rear hand-railing on said engine was wholly broken off, and the rear foot-board on said engine was partly broken, of which defendant had due notice and which was unknown to this deceased. Answering this, the defendant admits the employment of the deceased, and that it was necessary for him as such yardman to ride upon said engine and cars; but denies that it was necessary for him, in the usual course of his employment, to get on or off said cars and engine while the same were in motion, and denies that said engines are usually provided with hand-railings or foot-boards to enable the yardmen or brakemen to get on and off the said engine while in motion. Defendant admits that deceased, on or about December 1, 1880, while engaged as yardman, attempted to board said switch-engine, and in doing so slipped and fell, and received injuries from which he died on or

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about the tenth of December, 1880, but denies that deceased was in the proper performance of his duties, or that the engine was improperly or unskilfully constructed or handled. Defendant admits that at the time of the accident the rear hand-rail of said engine was wholly broken off and was absent; also that a small piece of the rear foot-board was and had been broken off for a long time prior to said accident; but alleges that the same was known to deceased, and that in all other respects said engine was in a good, safe and proper condition. Defendant denies that said accident was owing to any carelessness, omission, negligence or want of skill on the part of the defendant, and alleges that said accident occurred solely and entirely from the negligence and carelessness of the deceased.

Upon the trial of the case the following facts were uncontroverted: That on the first of December, 1880, the deceased was in the employ of the defendant in its switching yard in St. Paul, as yardman, where his duties were to couple and uncouple and switch cars, and ride to and fro upon the cars and engines as the necessity of the case demanded, being one of a crew of three who worked in the yard with one of the switch-engines of said defendant company; that he came down about seven o'clock in the morning from the upper to the lower yard in the cab of the engine in question on the main line; that he then coupled the engine to a car on a side track, and on that car being switched onto another side track, rode down on said car, set the brakes on it, and then came onto the track on which the engine was backing towards him, stood in the middle of the track and attempted to board the engine, and in so doing fell between the rails, was run over by the engine, and received injuries of which he died. As to the manner in which he fell there is a dispute in the evidence to which we will refer hereafter. The evidence is that the engine was proceeding at a rate of from one to three miles an hour, but there is no proof that it was carelessly or unskilfully handled by those in charge of it.

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It is in proof that the switch-engines in use in this yard are fitted with foot-boards at each end (there being no pilot) about six feet long, extending six or eight inches beyond the wheels of the engine, and eight or ten inches wide, and reaching about ten inches from the level of the ground; and said engines are also provided with a hand-rail in front and rear, running the width of the engine or tank,— the hand-rail on the rear part of the engine being, when in position, about six inches above the bed of the tank; and that there is the usual iron step and vertical hand-railing on each side of the engine, leading to the cab.

It is conceded that there was no hand-rail on the rear end of the engine in question, it having been pulled off the night before by the night crew that worked on said engine. It is also conceded that there was a piece broken from one end of the foot-board about two inches wide and eighteen inches long, running out to a point; but it is in proof that this defect in the foot-board had nothing whatever to do with, and in no way contributed to, the accident to the deceased, for the reason that where he stepped, or attempted to step, the foot-board was unbroken. The engineer of the engine in question stated that he had notified the master mechanic that the rear hand-railing was broken off some four or five days previous to the accident, and also that the foot-board was broken, by message and by letter to that effect. He also stated that the deceased was a skilful and experienced railroad man, and had been three or four months in the yard; that he had not ridden on this particular engine before, but had worked with another engine of the same kind, that was fitted with hand-rails and foot-boards of a like description, in the same yard; and that witness did not notify the deceased that the rail was broken off or the foot-board defective.

The main dispute as to the facts in the case arises between the testimony of the only two men who saw the accident, with regard to how the same happened. Both were on the foot-board, one at each end, when the deceased attempted to

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get on at the middle. The witness for the plaintiff states that he saw the deceased get on the foot-board with both feet and then reach up to catch hold of the railing, and, finding it gone, lost his balance and fell off, and was run over by the rear trucks of the tank. He says:

"We made a switch and threw a car on the side track, and he rode the car in. The engine backed up, and I got on the hind end, and he walked across the track and stood in the center, and when the engine came up he got on to ride, and with both feet, and after he got on he reached to the top of the tank to catch hand-hold, and missed it and fell back. I think the engine was going about a mile and a half or two miles an hour."

On the other hand, the witness for the defendant, who was on the other side of the foot-board, says: "The first thing I noticed him he was going under the foot-board. I noticed he was standing on the track until we got right close to him. I wasn't exactly looking at him, but I noticed him going under. . . . It seems to me he didn't get up onto the foot-board square at all. I don't think he reached his hand up to get hold of any part of the tank. I know if he had got over the foot-board he must have struck the tank in some place; the motion of the engine would have brought him up against the tank. There was no difficulty in seeing there was no hand-rail; any one that looked at the engine at all could see there was no hand-rail." On cross-examination this witness said: "I wasn't exactly looking at him. I can't tell exactly what he did do. I know he didn't come against the tank, because I was right up near the tank; and I know he didn't come that far, because if he came up against the tank,—I wasn't standing more than a foot and a half or two feet from him,—and I surely should have heard the noise on the tank, or something. I didn't see him slip. About the time I saw him he was going under. I should judge the engine was going about as fast as a person would walk — about three miles an hour." Both these wit-

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nesses state that it was customary to get on engines approaching them in that manner, and that they frequently did so themselves. Two division superintendents were called, who had been engaged in railroading twenty-six or twenty-seven years, respectively, and they both testified that the practice of boarding an approaching engine in the manner described was extremely dangerous and hazardous, and should never be attempted; while one who was the superintendent of the division of the defendant's road in St. Paul, and had charge of the yards in question, testified that he had always warned the yard-master here to forbid the men boarding an engine in front, coming towards them, and that if he saw any more of it he would dismiss the offenders; but they continued to do it. He further stated there was no general regulation to that effect.

Plaintiff's witnesses, in rebuttal, testified that they had never heard of any such order with regard to boarding an engine from the front, and had never received any such orders or warnings.

W. W. Erwin, for plaintiff.

Bigelow, Flandrau & Squires, for defendant.

MILLER, *Circuit Justice (charging jury)*.—The case before you presents two questions of fact to consider. The first is, whether the railroad company exercised due care and diligence in regard to the character of this engine on which the accident occurred. The main question in that respect, I think, turns upon whether there was negligence—carelessness—in starting that engine out (it having been originally not a very good one) with the want of this rail that was torn off the night before. It is the duty of these railroad companies, both with regard to passengers and to their own employees, to take due care, to exercise due diligence, to prevent accidents and injuries of this character; and it is their business to see to it that the usual appliances for safety and

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security of life shall be furnished in the places and at the times that these persons, whether passengers or servants, have to be employed in their service. I don't know that you will find much difficulty on that branch of the subject. The other branch of the subject is, that if you find that the company was negligent in regard to the character of this engine,—that it might have exercised and ought to have exercised more care in the kind of engine that was used,—then you will come to the question, did the plaintiff exercise proper care and diligence? For, although the negligence of the railroad company may be a cause, and probably a principal cause, of this man's loss of life, yet if he was careless himself, if his want of attention to his own safety contributed in any sensible degree to his death, the railroad company is not responsible. And that, as you will see at once, arises from a philosophical examination of the necessities of the case. These railroad companies furnish a great amount of operative force, all of which is more or less dangerous, and most of which can be subjected and used in a manner which is dangerous to the personal safety and life of the individual, and their operations require that they shall use powerful instrumentalities. You cannot move these cars — you cannot move this immense machinery — you cannot use steam any more than you can use powder, without there being elements of danger in it; you cannot carry these great loads of freight, or transport the produce of Minnesota to the Atlantic ocean, and on its way to Europe, without the use and exercise of a power which, in itself, is naturally dangerous. These railroads do a great deal of good. The good that they do is largely in excess of the ill they bring. They have become a necessity of human life, and modern commerce and business, and they must employ these dangerous and powerful agencies. The law requires them, however, to be very careful how they employ these dangerous agencies; it requires them to exercise constant vigilance and care that all their instrumentalities shall be of the proper and best quality;

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that in the use of them guards shall be taken for the security of limb and person by those who are engaged, who are transported, by them, whether as passengers or employees.

Now, that is the power employed by the railroad, and that is the duty of the railroad; but, for the very reason that the instrumentalities employed by these railroads must be powerful, must exercise very great force, must bring into play numerous elements that are dangerous to human life, it is necessary that those who deal with them should themselves exercise proper caution. A man has no right, because a fire is built in his neighborhood, to put his finger or his clothes into it and burn them, and then say, "I may sue and recover damages." A man has no right to thrust himself forward into a dangerous position and say, "If I am killed somebody will get damages for it;" or, "If I am hurt, I shall go to the hospital and be taken care of and recover damages." He has got to take care of himself, as well as the railroad has to take care of its duties and its employees. These obligations are mutual, and it is the law, and it is your duty to require it, as the law, that if a man voluntarily puts himself into a dangerous position,—does so unnecessarily, when there are other positions in connection with the discharge of his duty which are safe, which he can be placed in,—he cannot recover of the railroad company for damages for that injury to which he has contributed by his own negligence. That is the law. It is your duty to regard it, and you have no right to say that because this railroad company is a great and powerful instrumentality it must pay for this man's life, whether he was negligent or careless, or not.

Now, whether he was negligent or careless is for you to say. And it does not depend upon the opinion of any of these witnesses altogether. Inasmuch as some of them have had large experience and have been much used to these things, and can see what perhaps you cannot see, their opinion is worth something, but is not necessarily to control you. You are yourselves to use the common sense for which

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you were summoned here as jurors, and say if this man, getting right in front of that machine, which was progressing towards him,— with a capacity to ruin him, to destroy him, to run over him, to kill him,— whether he acted carefully in stepping up upon that eight-inch or a foot-wide board, when, if he fell or slipped or lost his grip, or if there was no grip to take, he must inevitably go under and be killed, whether he exercised prudence, when he could have accomplished the same end by getting on at the side, or, in the slow progress the engine was making, by getting on in the rear with perfect safety and perfect immunity, from endangering his life, at all events, whatever else might have happened to him; and if you believe that he did, carelessly and without due regard for his own safety, get upon this engine in a dangerous position, where it was much more probable that he would have been injured than by taking a safer course,— if he did this of his own promptings, and not because anybody told him to do it, then he is not entitled to recover any verdict at your hands.

That is the law of this case, gentlemen. You may take it.

The jury brought in a verdict for the plaintiff for \$1,000.

Before the jury were discharged defendant's counsel moved for a new trial on the ground that the verdict was contrary to the law and the evidence, and asked that the motion be then heard.

The Court. I will hear the other side.

Mr. Erwin. I would like to refer your honor to some authorities on the subject of contributory negligence.

The Court. You may read them to the next judge who tries the case. I set this verdict aside. It was as clear a case of contributory negligence as has ever come under my observation, and it is with great reluctance that I refused to instruct the jury to find for the defendant. It is not only a case of clear negligence on the part of the deceased, but a case of stupid negligence on his part.

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SHELLEY v. ST. CHARLES COUNTY.

(*Eastern District of Missouri. October, 1833.*)

1. CONSTITUTIONAL LAW — ARTICLE 14, § 11, OF THE CONSTITUTION OF MISSOURI — SWAMP-LAND ACTS OF 1869 AND 1870. — Where a statute authorized a county to improve swamp lands situated within its limits, upon being petitioned by a majority in interest of the owners of such lands to do so, and upon being shown by such owners that the improvement is practicable and their declaring themselves willing to pay their just proportion of the expenses; and, provided that the benefit to the county should be estimated and be paid by the county, and that funds to pay the balance of the expenses should be raised by the county by issuing county bonds, and that funds to pay the bonds should be raised by taxes assessed exclusively on the lands benefited, — *held*, that the statute was valid and did not authorize the county "to loan its credit to any company, association or corporation," within the meaning of the provision of article 14, § 11, of the constitution of Missouri.
2. MUNICIPAL BONDS — PRESUMPTION IN FAVOR OF LEGALITY. — *Seemle*, that where the constitutionality of a law under which county bonds have been issued is doubtful, federal courts will, in advance of any consideration of the subject by the supreme court of the state or of the United States, resolve all doubts in favor of the validity of the act.

On demurrer to petition.

This is a suit brought to recover judgment upon bonds issued by the defendant under the provisions of certain statutes mentioned in the opinion, authorizing the county to issue such obligations to facilitate the reclamation of swamp lands, and to be known as "land improvement bonds."

E. B. Sherzer, for plaintiff.

W. A. Alexander and Dyer, Lee & Ellis, for defendant.

McCrery, Circuit Judge. — The demurrer raises the question of the constitutionality of the act of the general assembly of Missouri of March 3, 1869, as amended by that of March 14, 1870, under which the bonds sued on were issued. It is said that this legislation is in violation of the provision

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of article 14, § 11, of the constitution of 1865, which was in force when the acts above mentioned were passed, and which is as follows:

"The general assembly shall not authorize any county, city or town to become a stockholder in, or to loan its credit to, any company, association or corporation, unless two-thirds of the qualified voters of such county, city or town, at a regular or special election to be held therein, shall assent thereto."

The act of 1869 provided for the reclamation and protection of swamp and overflowed land by means of drainage, diking or otherwise. The expense of such improvement, it was provided, should be paid by an assessment upon the county at large, to the extent of the benefits accruing to the whole county by reason of the improvement; the amount to be so assessed to be determined by the county commissioners after investigation, and the remainder by an assessment against the individuals benefited thereby, in proportion to the number of acres reclaimed or improved for them respectively. The act of 1870 provided for the issue of bonds, in lieu of immediate taxation, as the mode of raising the funds necessary for paying the expense of such improvement; and, for the raising of funds to pay such bonds, principal and interest, by taxes assessed exclusively on the lands improved, benefited or protected by such improvements, except such portion as may be deemed by the commissioners to be justly chargeable to the county at large, according to the provisions of said act of 1869, which portion the county is to pay out of money collected for general purposes.

An examination of these statutes shows that they do not attempt to authorize a county either to become a stockholder in, or to loan its credit to, any company, association or corporation. The owners of the swamp lands to be reclaimed, and who join in a petition to the county authorities for the purpose of invoking action to that end, and agreeing to pay their just proportion of the expense, can scarcely be regarded

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as an "association," within the meaning of the constitutional provision above quoted. They are clearly not a legal body of which the county could by possibility become a stockholder. They are not incorporated, nor in any manner organized or associated together, so as to be capable of issuing stock. But it is said they constitute an association to which the county has attempted to loan its credit. Not so. The county has made no loan of credit to any one. It has issued its own bonds, agreeing to raise money for their liquidation by a levy of taxes upon certain property. The bonds do not constitute a loan of credit to any association of swamp land owners. By the statute the county contracts for the improvement, paying therefor with the bonds. The county does not engage in a purely private enterprise, nor does it undertake to aid a corporation, company or association in carrying forward such an enterprise. It is the common case of a statute authorizing the construction of drains or of levees in order to protect or relieve swamp, marshes, and other low lands, and for the payment of the expenses thereof by special assessments.

Such statutes are very generally held valid, sometimes upon the ground that such improvements are important to the public health, sometimes as a proper police regulation, and sometimes upon the ground that the general public are interested in reclaiming such lands for use, and thus adding to the value of the taxable property of the county or state. It is competent for the legislature to require the owners of property to be permitted to make the improvements, and to enact that, in case of their default, the county may do so at their expense, and charge the sum to the property benefited through a special assessment of taxes thereon; and there seems to be no reason to doubt that the legislature may provide for an apportionment of the expense between the county at large and the owners of the property especially benefited. The statutes under consideration here authorize the county authorities to determine what proportion of the expense shall

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be borne by the county at large, and what by the property reclaimed. The general principles by which we are guided in holding this legislation to be valid and constitutional will be found set forth in Cooley, Taxation, c. 20, under the head of "Taxation by Special Assessment." We are clearly of the opinion that the legislature of Missouri, in enacting the statutes in question, was acting within the principles there enunciated, and not attempting, in violation of the constitution, to authorize a loan of county credit to a corporation, company or association.

It is proper to add that, if the question were doubtful, this court would feel constrained, especially when dealing with it in advance of any consideration of the subject by the supreme court of the state, or of the United States, to resolve all doubts in favor of the validity of the act in question. *Gilchrist v. Little Rock*, 1 Dill. 261.

Demurrer to petition overruled.

SUN MUT. INS. CO. and others v. MISS. VALLEY TRANSP. CO.

(*Eastern District of Missouri. September, 1883.*)

1. COMMON CARRIER — LIABILITY FOR AGENT'S NEGLIGENCE. — Where A. employs B., a common carrier, to transport goods to C., and B. employs D. to transport them part of the way, and they are lost *in transitu*, while in D.'s possession and through his negligence, B. is liable for the loss to A., or any one who may become subrogated to his rights.
2. SAME — LIABILITY TO INSURER WHO HAS BECOME SUBROGATED TO SHIPPER'S RIGHTS. — Where a carrier becomes liable to a shipper for the loss of goods, and an insurer pays the shipper the amount of the loss, becomes subrogated to his rights, and sues the carrier for the damages sustained, the carrier cannot avail himself of defenses which might have been interposed by the insurer in an action at law against it.
3. INSURANCE "FROM ST. LOUIS TO NEW ORLEANS" — LOSS IN HARBOR. — Where goods insured "from St. Louis to New Orleans" are lost while being transported from East St. Louis to St. Louis, pre-

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paratory to a final start, by the carrier which has undertaken to transport them to New Orleans, the loss is within the terms of the policy; for the purpose of such a case, the harbor of St. Louis ought to be regarded as extending to the opposite shore.

4. **SAME — EVIDENCE.**— In this suit the policies of insurance were not introduced in evidence, and secondary evidence in lieu thereof was admitted without objection except in one instance, and the fact of insurance was apparently taken for granted. At the hearing in this court it was for the first time objected that the libelants were not entitled to recover because they had failed to show that the goods lost were insured. *Held*, that, under the circumstances of the case, the objection should be overruled.

Admiralty appeal from district court.

The libelants are insurance companies, and as such insured certain goods shipped from St. Louis to New Orleans upon the boats of defendant, and the said goods having been lost in part, and in part damaged by a collision, they paid the losses to the shippers, and sued the defendant in admiralty. Decree below for libelants, and defendant appeals. The other facts sufficiently appear in the opinion.

O. B. Sansum, for libelants.

Given Campbell, for defendant.

MCCRAEY, Circuit Judge.— The defendant, as a common carrier, agreed to transport certain goods described in the libel from St. Louis to New Orleans. The goods were laden on defendant's barge New Orleans. The defendant employed a tug-boat to tow said barge from its moorings at East St. Louis to the levee in St. Louis, there to be taken in tow by a tow-boat belonging to the defendant, and carried on its way to its destination. It was while the barge New Orleans was being towed by the tug-boat, thus hired for the purpose by the defendant, that a collision occurred, resulting in a loss of part, and in damage to the remainder, of the goods in question. Libelants having insured the goods, and paid the losses to the shipper, sued to recover their damages

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by right of subrogation, and as to some of the goods by right, also, of an assignment from the shippers. The evidence shows that the collision and consequent loss were the result of negligence on the part of the persons in charge of the tug-boat employed by defendant to tow the barge containing the goods from East St. Louis to St. Louis.

Anticipating this finding, the counsel for defendant has argued very fully and ably the question whether this fact fixes a liability upon the defendant for damages. The contention of counsel is that the relation of master and servant did not exist between defendant and the master and crew of said tug-boat, and that, therefore, defendant is not liable. Conceding that defendant would have been liable as principal if the tug-boat had been manned or officered and controlled by it, or had been used by defendant in its regular business, the defendant's counsel argues that inasmuch as the tug was an independent vessel, and operated by its owners for towing vessels about the harbor, it is alone responsible to the shippers for the losses in question.

It appears that the use of tugs for such purposes is customary in the harbor of St. Louis, and it is insisted that the shippers must be held to have employed the defendant with the knowledge that it might, and the expectation that it would, employ that means of moving its barges to the St. Louis landing.

It is no doubt true that no one can, in the absence of contract, be made liable for a breach of duty, unless it be traceable to himself, or to some person who holds the relation to him of agent or servant. And this doctrine has often been applied to cases of collision between vessels where one of the colliding vessels is being towed by another vessel, and is wholly under the control of the officers and crew of the latter. It is held that the owner of the tow, in such case, cannot be held responsible for the negligence of the officers and crew of the vessel by which it is being towed. *Sprout v. Hemmingway*, 14 Pick. 1; *Sturgis v. Boyer*, 24 How. 110.

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But these, and other like cases relied upon by defendant's counsel, were actions of tort, brought by the owners of a vessel destroyed or damaged by collision, and do not apply to such a case as the one now before us, where a shipper, or another standing in his place, sues a common carrier to recover damages for the breach of a contract of affreightment. The two classes of cases are altogether different. In the former, the suit is brought by a stranger against a master to recover for the negligence of his servant, and the rule of law applicable, as stated by Shaw, C. J., in *Sproul v. Hemmingway*, is "that where a stranger suffers by the negligence or unskilfulness of another's agent or servant, the owner or employer shall stand chargeable for the damage." In the latter, the suit is brought, not by a stranger, but by a party to a contract, and is governed by the well-known rules respecting the duties and liabilities of common carriers.

When a common carrier receives goods into his possession for transportation he becomes a bailee for the shipper, and is responsible for the safe transmission of the goods to their place of destination, whether he keeps them in his own possession or intrusts them to an intermediate carrier on the way. The carrier is employed to transport the goods over the entire route, from the place of shipment to the place of destination, and the measure of his responsibility does not depend upon the question whether the persons who have charge of the goods *en route* are servants or not. If the carrier permits the goods to pass into the hands of another over whom he has no control, and that other shall embezzle or lose them, or permit them to be injured without lawful excuse, the carrier cannot defend upon the ground that such person was an independent carrier, not subject to his direction, having control of his own vehicles.

The character of the carrier as an insurer of the goods carried is totally inconsistent with the idea that his liability is to be measured by the law of master and servant. To fix the responsibility of a common carrier for goods lost in

transitu, it is not necessary to prove negligence either on the part of the carrier or his servants, except in cases where the carrier's liability is limited by contract. In those cases the negligence may be shown, and the carrier held liable, notwithstanding such a limitation, upon the ground that he will not be permitted to contract for exemption from the consequences of his own negligence or that of his servants. The duties which the common carrier undertakes to perform, and not the instrumentalities employed, must be regarded as the criterion of his liability. It is upon this principle that express companies are held to the responsibilities of common carriers, although they have no interest in or control over the conveyances by which the goods are transported.

"It certainly never was supposed that a person who agreed to carry goods from one place to another, by means of wagons or stages, could escape liability for the safe carriage of the property over any part of the designated route by showing that the loss had happened at a time when the goods were placed by him in vehicles which he did not own, or which were under the charge of agents whom he did not control. The truth is that the particular mode or agency by which the service is to be performed does not enter into the contract of carriage with the owner or consignor." *Buckland v. Adams Exp. Co.* 97 Mass. 124; Lawson, Carr. § 233, and numerous cases cited.

My conclusion upon this subject is that, as between the carrier and the shipper or insurer, the carrier is liable for the loss of the goods while *in transitu*, though at the time of the loss they were in the possession of a third party, who was transporting them at the request of the carrier; and that, in so far as it is necessary to apply the doctrine of agency, such third party is the agent of the carrier, for whose defaults he is responsible. This case is stronger than those in which the carrier agrees to transport goods beyond the terminus of his line, and in those cases he is held liable

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for the acts of others to whom he delivers the goods, unless he contracts specially against such liability. Lawson, Carr. § 235, and cases cited.

As to a portion of the goods lost, the defense is interposed that they were not within the contract of insurance, and that, therefore, although the carrier may have been liable to the shipper, the insurer has no right to recover. This branch of the case arises upon the following facts: The goods were insured "from St. Louis to New Orleans." A part of the goods were in St. Louis, and another part in East St. Louis, on the opposite side of the river. The defendant placed those that were in St. Louis upon the barge in which they were to be transported, and then employed the tug above mentioned to carry the barge, with those goods in it, over to East St. Louis, there to place on board the portion of the cargo in store there, and to return to the St. Louis levee for the final start to New Orleans. After taking on board the barge the goods at East St. Louis, and starting back across the river, the collision complained of occurred as above stated.

Upon these facts it is insisted that as to so much of the cargo as was taken on board at East St. Louis the insurance company was not liable, because that property was not *en route* from St. Louis to New Orleans at the time of its loss, and it was said that, inasmuch as the insurance company was not liable on its policy, it could not, by paying the loss, acquire any right of subrogation. As to this particular portion of the cargo, there is no assignment from the shipper to the insurance company.

The question whether the voyage from St. Louis to New Orleans had been commenced, within the meaning of the policy of insurance, so as to make the insurer legally liable, may admit of some doubt, though I am, as will presently appear, strongly inclined to the opinion that it had. Waiving, however, this question for the present, I hold that since the insurance company in this case saw fit to waive the ob-

jection and treat the loss as within the policy by paying it, the carrier cannot be heard to object, for the reason that its liability to the shipper is clear, and it is in nowise injured by being called upon to make payment to the insurer. Such was the conclusion reached by Woods, circuit judge, in *Ins. Co. v. The C. D. Jr.* 1 Woods, 72, and the doctrine seems to be entirely consonant with justice and equity. It would be contrary to the spirit of the admiralty law, which proceeds upon principles of the broadest equity, to permit the carrier, who is shown to be clearly liable to the shipper, to avail himself of all the defenses which might have been interposed by the insurance company if sued in an action at law upon the policy.

It has been held, upon very analogous principles, that the owner of a vessel upon which he is carrying a cargo for the shippers may, in case his vessel is run into and sunk by another vessel, maintain a suit in admiralty against the offending vessel and her owners for the loss, both of vessel and cargo, *even after an abandonment to the underwriters.*

"The respondent is not presumed to know or bound to inquire as to the relative equities of parties claiming damages. He is bound to make satisfaction for the injury he has done." *Newell v. Norton*, 3 Wall. 257; *Monticello v. Mollison*, 17 How. 153.

If, therefore, it were conceded in the present case that the voyage insured against had not commenced when the loss occurred, I should hold that the carrier by whose negligence the loss occurred has no interest in raising that question, and it is not one which in any way concerns him. The insurers here are clearly not mere volunteers. It is, however, manifest, I think, that the voyage insured against had commenced at the time of the loss. The harbor of St. Louis may well be regarded, for the purposes of such a case, as extending to the opposite shore of the Mississippi river, and an insurance against loss upon a voyage "from St. Louis to New Orleans" may well be held to cover a loss occurring,

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as this did, while the cargo is being brought by the carrier from East St. Louis to St. Louis under the circumstances above stated. The carrier had assumed the control and taken possession of the goods for the purposes of the voyage, and the fact that some were one side of the river and some on the other is of no consequence.

It is also contended by defendant's counsel that the proof fails to show that the property lost or injured was insured by the libelants. The evidence touching this point is certainly secondary, the policies of insurance not having been introduced in evidence; but, with the exception of the statements made by a single witness, no objection has been raised on this ground until the present hearing. The point is purely technical, for the fact of the insurance seems to have been taken for granted throughout the litigation. If the objection now for the first time made should be sustained, a proper regard for the substantial rights and equities of the parties would require the court to permit the policies to be now introduced, and that the court can do this at any time before final decree is very clear. As there is no room for doubt as to the fact, the defendant would gain nothing by now insisting upon the best evidence, and I therefore, without a very careful consideration of the merits of the objection, overrule it. The decree of the district court is affirmed.

EGGLESTON and another v. CENTENNIAL MUTUAL LIFE ASS'N OF
BURLINGTON, IOWA.

(Eastern District of Missouri. September, 1883.)

1. INSURANCE—MUTUAL ASSOCIATION POLICY—HOW ENFORCED—PRACTICE.—Where a policy of insurance issued by a mutual association does not fix upon the association an absolute liability to pay any particular sum, but only a liability to pay the proceeds of a particular assessment to be levied in a particular way, not to exceed a certain sum, and further provides that the association shall only be liable

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in a proceeding to compel it to make the assessment, an action at law to recover the maximum amount named in the policy cannot be maintained.

2. **SAME.**—The only remedy in case of the assured's death is by a proceeding in chancery to compel a specific performance.

At law.

McCRARY, *Circuit Judge (orally)*.—This case is before the court on demurrer to the petition. It is a suit on a policy of insurance issued to him by the defendant, which is a mutual insurance company. The policy provides that in case of the death of the assured the company will proceed to make certain assessments upon the policy-holders for the purpose of paying the loss. The amount of the loss to be paid is not absolutely fixed by the provisions of the policy; it provides for a certain mode of assessment upon the policy-holders in case of the death of a member, and for the payment of the proceeds of said assessment, not exceeding \$5,000 in this case, to the beneficiaries of the insured. The policy also contains, among other conditions, the following:

“The only action maintainable upon this policy shall be to compel the association to levy the assessments herein agreed upon, and, if a levy is ordered by the court, the association shall be liable under this policy only for the sum collected under an assessment so made.”

The question is whether that is a valid provision of this contract of insurance, because, this being an action at law, it cannot be maintained unless that provision of the policy is set aside. This is an action to recover \$5,000, which is claimed as due upon the policy. I would not be willing to say that no action at law can be founded upon a policy of this character. Facts and circumstances might arise under which the beneficiaries could bring a suit at law upon the policy, but I am unable to see any sufficient reason for holding that such a contract as this is absolutely null and void. It is not a contract which confers a right and denies a rem-

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edy (such a contract might well be held to be contrary to public policy), but it is a contract which confers certain rights upon the policy-holder, and in which the parties agree that the remedy shall be by a proceeding to compel the levy of the assessment, and not by an action at law to recover damages. If the policy provided in clear terms that the beneficiaries shall, in case of death, receive a particular sum, to be recovered by assessment or to be paid by the company after making an assessment, if the company had refused to make an assessment, I am inclined to the opinion that an action at law might be maintained, especially if there was no provision in the policy itself forbidding it. But since the policy here does not fix upon the company an absolute liability to pay any particular sum, but only a liability to pay the proceeds of a particular assessment, to be levied in a particular way, and since it further provides that the company shall only be liable in a proceeding to compel it to make the assessment, we are of the opinion that an action at law cannot, at least in the first instance, be maintained. However inequitable such a contract may be, it is undoubtedly within the power of the parties to enter into it, and therefore we think that the only remedy, according to the practice of this court, and under the terms of the policy, is by a proceeding in chancery to compel a specific performance. The demurrer to the petition must, therefore, be sustained, but the plaintiffs may, if they choose, have leave to file a bill to compel the assessment in accordance with the contract.

Geo. D. Reynolds, for plaintiffs.

Davis & Davis and *Newman & Blake*, for defendants.

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OSBORNE and others v. SMITH.

(District of Minnesota. October, 1885.)

1. **GUARANTY — WHAT CONSTITUTES.**— The defendant is agent of the plaintiff to sell machines. The contract entered into by the parties provides, among other things, that in case the machines are not paid for wholly in cash, the note of the purchaser for the unpaid balance shall be given, payable to the order of the plaintiff, "and shall be indorsed, and the collection thereof guarantied, by the 'defendant,' waiving demand, protest, and notice of non-payment." The defendant is sued as guarantor of certain notes. The court, in charging the jury, *held*, that the defendant, by indorsing a note in compliance with the terms of the contract, became a guarantor.
2. **SAME — USUAL RULE AS TO LIABILITY OF GUARANTOR.**— Ordinarily, to render a guarantor liable, the execution against the principal debtor must have been returned *nulla bona*.
3. **SAME — PRIMA FACIE DILIGENCE — JUDGMENT IN JUSTICE'S COURT — RULE.**— A judgment obtained against the principal debtor in a justice court, although not recorded so as to become a lien on real estate, is *prima facie* evidence of due diligence. When the debt itself can only be collected in the justice court, a creditor is only bound to proceed by suit, obtain judgment and issue execution. Such evidence will be overthrown by showing that the principal debtor had real estate which might have been secured by recording the justice court judgment.
4. **SAME — RULE AS TO SOLVENCY.**— To be solvent, one must have property out of which his debts can be collected. A guarantor cannot require that suit be first brought against the principal debtor, if the latter is insolvent.
5. **SAME — CHATTEL MORTGAGE — SUBROGATION OF GUARANTOR.**— A creditor is not required to resort to a chattel mortgage given by the principal debtor before suing the guarantor of the debt. Should the guarantor pay the debt, he would be entitled to be subrogated to the rights of the creditor against the debtor.
6. **ATTORNEY'S FEES IN NOTE.**— To entitle the holder of a note to the attorney's fees stipulated therein, suit must first be commenced against the maker of the note.

At law.

NELSON, *District Judge (charging jury).*— This suit is brought by D. M. Osborne & Co., a corporation organized

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under the laws of the state of New York, against the defendant Smith, who was one of its agents. The suit is brought upon the guaranty of Smith upon twenty-nine notes, and is also brought to recover upon his individual promissory note, which was given to this company for the purchase of certain machines. This corporation was engaged in the manufacture of mowers and reapers, and the manufactured articles were sent broadcast to agents throughout the western states. Smith was appointed an agent under a contract which he made with the company for Jackson county, the county of Cottonwood, and portions of Nobles county, in this state, December 3, 1879. This contract ran for the season, which ended on the first day of August, 1880, and most of the obligations upon which he is sued as guarantor were made during the year 1880.

It is necessary, gentlemen, for the plaintiff in this case, before it can recover, in the first place to prove the contract of guaranty; next, to prove that the defendant Smith is in default. It is claimed that the contract of guaranty in these cases was contemporaneous with the original trade; that is, that when the principal debtor entered into his contract with the company, Smith, by virtue of his contract with the company, became contemporaneously responsible as guarantor for the payment of the debt — the principal debt. I might here call your attention to this contract of 1879, which was entered into, terminating, as I said, on the first of August, 1880. It is a very stringent contract, gentlemen, and a valuable one. It is a contract of agency for the sale of these machines, but certainly it is presumed to have been of considerable value to the defendant, for he subsequently renewed it, and we have here in evidence another contract which was entered into on the twentieth of December, 1881. Although it contained very stringent terms, as far as the agent was concerned, still it was signed and entered into by this agent with his eyes open. It is in print, and evidently must have been well understood by the defendant in this case when he

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entered into it. In order to sustain the first position which I stated to you, it was necessary for the plaintiff to prove this contract of 1879, which contains this provision: "All machines received from the said party of the first part [that is, the corporation] shall be sold by the said party of the second part, either for cash or such good and approved notes as are hereinafter described, and all such machines shall be and remain the property of the said D. M. Osborne & Co., until so sold or are otherwise settled for as herein provided."

As between the agent and themselves it was a sort of conditional sale; that is, the machines that were shipped to him were conditionally sold to him, provided he complied with the terms of the contract itself. "When sold for cash, either in whole or in part, the moneys received, to the amount of the price of such machine as above specified, shall be received by said party of the second part as the moneys of and for the said D. M. Osborne & Co."

It is very stringent, gentlemen, and provisions, as you will see, are put in evidently with the intention to hold the party to the agreement liable to indictment in case he appropriated the funds that he received in payment for these machines: "And be transmitted by said party of the second part to said party of the first part, by express or draft, without delay." Now, here is the provision that shows the character of the guaranty: "And when not wholly paid for in cash, notes of the firm, furnished by the party of the first part, shall be taken for the unpaid balance of the hereinbefore specified price, as the case may be, signed by the purchaser, and payable to the order of the said party of the first part [this Osborne & Co.], and shall be indorsed, and the collection thereof guarantied, by the said party of the second part, waiving demand, protest, and notice of non-payment thereof, and be made payable at some bank or express office located in the county which is the residence of the purchaser." That explains the character of the guaranty which the defendant

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in this case entered into when he signed this contract of 1879.

Now, the plaintiff has offered in evidence, in addition, various notes which were received by the defendant Smith on the sale of these machines which were sent to him. These notes are all of the same character, although some of them have attached to them, and forming a part of them, a statement as to the amount of real estate that the party purchasing is possessed of. We have very little to do at present with the face of the notes. It is the contract of the defendant here upon the back which is important in this case. On the back of this note which I hold in my hand—the note of Langer—is the guaranty of Smith, by which he complies with the contract in the manner in which he bound himself to comply when he signed it. All of these notes which have been offered in evidence here, in order to show what Smith engaged to do, are of similar character, except in some instances there appears to be more than Smith's guaranty. Other persons appear upon the note as joint and several guarantors with him. Now, what was Smith's contract? That is, what was the legal import of Smith's contract when he, in pursuance of the original contract for the sale of these machines, put his name on the back of this note? Smith's contract is this: He agrees that if Osborne & Co. shall not be able to collect by due course of law these several obligations which have been signed by various parties here who bought these machines, that he, the defendant,—that is, he Smith,—would consider himself responsible for the same, without requiring any demand or notice of the non-payment of the note itself. That is his contract of guaranty, and that is the legal effect of placing his name upon the back of these various notes as he has done.

Now, if the plaintiff has performed on its part all it was required to do under and by the terms of this guaranty, and the guarantor has all the rights which he as a guarantor was entitled to in law, why, then, he cannot escape the liability

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that is fixed upon him by law in signing this note as he has done. As I said, it is necessary for the plaintiff in this case to go still further, and to show that Smith was in default, before he can recover, the contract of Smith being that he is only responsible in case the notes cannot be collected by due course of law. Ordinarily it would be necessary for the creditor to commence legal proceedings, and obtain judgment and issue execution, and the execution be returned "no property found," before a creditor could collect the amount of the obligation from the guarantor. Now, it appears here in this case, without contradiction, that in some instances judgments were obtained against the principal debtor. I would call your attention to judgments that were obtained against Molas, for whom Smith became a guarantor, and also three judgments against Mary Stevenson for various sums. It has been urged by counsel on behalf of Mr. Smith, that, inasmuch as these judgments were obtained in justice court, and were not recorded in the district court, which is a court of record, which was necessary in order that they become a lien upon real estate, that they are not evidence of due diligence on the part of the creditor. They are *prima facie* evidence, gentlemen, of due diligence. Where the debt itself can only be collected in justice court, the rule of law is that the creditor is only bound to proceed by suit, obtain judgment, and issue execution. He is not required to use any extraordinary means and have the justice's judgment put upon the record of the district court in order to make the judgment itself *prima facie* evidence of due diligence on its part. Then, in order to overcome the *prima facie* case, it is necessary for the guarantor to show that, if the judgment had been put upon record, the maker of the obligation had real estate which could have been seized by placing upon record the justice's judgment. Now, there is no evidence in this case, gentlemen, that these parties had any real estate against which this judgment could be enforced. So far as the judgments

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are obtained, they will be noted upon a memorandum, which I will hand to you, so that your duties may be partially expedited. The verdict in this case must go against the defendant, at least so far as the Molas judgment and the Mary Stevenson or McDonald judgment are concerned. Well, a number of judgments have been noted here; I may be mistaken as to the number; but however many there are, the same rule would apply which I have stated.

I will here call your attention to the other cause of action against Smith himself, individually, upon this note, which was given for the purchase of machines. This note was given by Smith, and the only defense that he appears to have against it, which he attempts to urge here, is that there was a failure of consideration, viz., that the machines were worthless. This defense of failure of consideration, as I said yesterday, gentlemen, comes too late, and, so far as that obligation is concerned — \$322, and interest upon it — there must be a judgment against him under any circumstances; and that brings me, gentlemen, to the other causes of action in this case. Now, as I have stated to you, the contract of Smith was to become responsible for the collection of these various obligations on which he appeared as guarantor. In all those cases where suit has not been brought it is necessary for the plaintiff, before he can put the guarantor in default, to show that all these makers were insolvent; and by insolvency I mean this: I will give you the rule, as stated by the learned counsel, that the person must have property which can be seized for the payment of his debts before he is solvent. If he has property only which is exempt, so that he can stand back and laugh at his creditors, why he is not a solvent man within the purview of the law. To be solvent he must have property out of which his debts can be collected. It is not necessary that they should be paid immediately when they are due, but the debts which he has incurred must be collectible out of property which is not exempt from execution, and that is the principal issue in

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this case, gentlemen; that is the issue of fact for you to determine. You have heard all the testimony here in the case *pro* and *con.*; seen the witnesses on the stand here. Many of them are Germans who cannot speak the English language, and none of them have any real estate. They have secured the title to no real estate. It is all government land — a homestead. At the same time you have heard what they have said with regard to their ability to pay their debts. You will consider whether the plaintiff in this action had made out his case. If it has proved, by a preponderance of evidence, to your satisfaction that these gentlemen are insolvent, then it was not necessary for it to pursue a fruitless litigation and incur costs to attempt to recover judgment, because, if the company had done so and had failed, why the guarantor would be responsible for all the costs that have been incurred by that litigation, as well as in the end be responsible for his guaranty. But, if these men are not insolvent, and if due diligence has not been used on the part of Osborne & Co., and these notes could have been collected, and Smith has lost by it, of course then you cannot hold him. That is a question for you to determine from the evidence.

There is another question here. In a great many of these cases chattel mortgages have been taken. Now, it is not necessary, when a chattel mortgage is taken in addition to other security, that the creditor should foreclose the chattel mortgage before he can sue upon the guaranty; but if he sues upon the guaranty before he exhausts the remedy upon his chattel mortgage, and the guarantor pays the debt, then the latter is entitled to the benefit of all such securities received; but in this case it does not appear that in any instance the guarantor has paid any of these obligations. The question may hereafter arise if he pays up the amount here, and there has been a loss to him by negligence and failure to properly foreclose the securities, and apply the amount obtained upon these notes. Now, gentlemen, I shall not detain you any

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longer. Here is a little memorandum. By the way, there are four other notes,—four notes here of Leidtke and Zellner, which were turned over to Osborne & Co. on a settlement under a contract entered into by Smith with this company in 1881. This contract provided that all these notes that were received by Smith in payment for these machines must be turned over as fast as they were received if Osborne & Co. required it. It is optional with them. Smith can retain them in his possession if not required to turn them over by Osborne & Co. Now, as I said, this contract contemplated a settlement. Smith might have a large amount of notes in his possession, and not be required to turn them over as fast as he received them. On a settlement, either at the time the contract would expire, or soon thereafter, then Smith would be required to turn over all the notes that were taken by him in a general settlement. Now, if any of those notes which he turned over on that settlement, within six months after it occurred, were worthless or doubtful,—if it was doubtful whether they could be collected, or they were absolutely worthless,—then Smith was required to replace them with cash, or notes secured by good responsible parties, which would be acceptable to the parties of the first part; that is, Osborne & Co.

Mr. O'Brien. I think that provision applies to the inception, if it was discovered within six months that they were worthless at the time they were taken.

The Court. I am mistaken. If these notes that were to be turned over in settlement were doubtful or worthless at the time that Smith took them, when he sold these machines, why then the company said: "You must be responsible for these notes. We must, however, be diligent, and we will say six months; that we must discover within six months that these notes were doubtful or worthless at the time of the sale." It is immaterial whether Smith knew they were doubtful or not in fact at the time they were given. If at the time he took them upon the sale of this machinery they

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were doubtful, or were worthless, and the company within six months discovered the fact and asked Smith to replace them, if he did not do it he would be responsible. Now, there are four notes of that character,—the Leidtke and Zellner notes; two of each, I think.

There is one note which amounts to some \$200 and interest, called "the George Clark note." The testimony of Smith is that this note was received by this company in payment for machines which he (Smith) purchased. You will recollect what he said about this George Clark note. He says that Clark was a man who traded with him, buying groceries, etc., and that he was indebted to him; that he gave him this note in settlement, and that he (Smith) turned over this indebtedness to Osborne & Co. as part payment for some machines that he himself actually purchased. Under the terms of the contract he was required at the end of the year, at the option of the company, to purchase all the machines on hand that remained over that season, and this Clark indebtedness, he says, was put into the form of this note, not as a note given for the purchase by Clark of any machinery, but was put in this form for the convenience of this transaction, and was turned over by him to Osborne & Co. in payment, or part payment, for these nine mowers that you have heard testified about. Now, it is claimed here that the provision in the note for attorney's fees, this ten per cent., cannot be recovered because no suit has been commenced against Clark. I am inclined to think that provision applies especially to the suit brought upon the note itself. It is a little vague in its terms, but I think before ten per cent. attorney's fees can be recovered there should have been a suit commenced on the note itself,—that is, against the maker; so that, so far as that ten per cent. for attorney's fees in these notes is concerned, there can be no recovery.

Here is a little memorandum which I have made, which I think is correct, with the exception that the attorney's fees, in every instance, should be struck out. In the case of

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those four judgments of course the attorney's fees are merged in the judgment, and that is the suit against the parties themselves, and can be recovered; but in the other cases you may strike out the attorney's fees, and deduct that from any sum that you may find for the plaintiff in this case.

Now, gentlemen, I think you will understand the testimony here,—understand the case, and I hope you will be able to arrive at a satisfactory conclusion. I will hand you this memorandum; I have compared it with the notes here, and it is proper also that you should have the pleadings and these notes, and you can run over this memorandum also, so as to satisfy yourselves as to the correctness of it. This memorandum was merely made by me to facilitate matters. You are not bound by it, gentlemen. You have the notes there and you can make your own calculations.

G. D. Emery, Jackson & Pond and Gordon E. Cole, for plaintiffs.

O'Brien & Wilson, for defendant.

KAEISER v. ILLINOIS CENT. R. CO.

(*Southern District of Iowa. October, 1885.*)

1. INTERSTATE COMMERCE — POWER TO REGULATE, WHERE VESTED — RAILROAD TARIFFS — HOW FAR GOVERNED BY STATE ACTS — TERMS DEFINED, ETC.— Article 1, § 8, of the constitution of the United States confers upon congress the power “to regulate commerce with foreign nations and among the several states.” This power of congress is exclusive. It follows that the act of the general assembly of Iowa, approved March 28, 1874, providing for a tariff of maximum charges for the transportation of freight and passengers by railroads, in so far as it relates to through shipments over interstate lines, is unconstitutional.
2. SAME — TERMS DEFINED AND PRINCIPLES STATED.— The court, in its opinion, laid down the following propositions as settled: (1) The

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transportation of merchandise from place to place by railroad is commerce. (2) The transportation of merchandise from a place in one state to a place in another is "commerce among the states." (3) To fix or limit the charges for such transportation is to regulate commerce. (4) A statute fixing or limiting such charges for transportation from places in one state to places in other states is a regulation of commerce among the states. (5) The power to regulate such commerce is vested by the constitution in congress. (6) This power of congress is exclusive, at least in all cases where the subjects over which the power is exercised are in their nature national, or admit of one uniform system or plan of regulation.

By an act of the general assembly of Iowa, approved March 23, 1874, a tariff of maximum charges was provided for the transportation of freight and passengers by railroad. The act, by its terms, applies to "all railroad corporations organized or doing business in this state, their trustees, receivers or lessees." It provides that "all railroads in this state shall be classified according to the gross amount of their respective annual earnings within the state per mile for the preceding year," and for a separate tariff of rates for each class. It also provides that the tariff of rates so established shall "be considered a basis on which to compute the compensation for transporting freight, goods, merchandise or property over any line of railroad within this state. This suit is brought to recover damages for overcharges upon freight shipped from points in Iowa to points in Illinois and Wisconsin over a part of defendant's road in Iowa, and over connecting lines in the other states named. The answer sets up, among other things, that the statute above named neither had, nor was intended to have, any extraterritorial operation beyond the limits of Iowa, and neither had, nor was intended to have, any application to or effect upon contracts, either expressed or implied, for the conveyance of persons or property from a point in one state to a point in another state. Plaintiff demurs to this answer, and the principal questions discussed by counsel are: (1) Did the act, by its terms, apply to interstate commerce? (2) If so, is it constitutional?

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A. B. & J. C. Cummins, for plaintiff.

John F. Duncombe, for defendant.

McCARY, *Circuit Judge*.—There may be room for doubt as to whether the act of 1874, by its terms, applies to interstate commerce. If it be construed as *in pari materia* with the subsequent act of the sixteenth general assembly (1876), “for the relief of certain railroad companies, agents and employees,” there is, I think, sufficient ground for holding that it was only intended to regulate such transportation as was carried on within the state. The latter act provides for releasing railroad companies from liability for having violated the act of 1874, upon certain conditions. Among these conditions was a requirement that such railroad companies should enter into bonds, with security, conditioned that they would not seek to evade the provisions of the act of 1874 “by increasing or contriving any increase on through rates to points on its line outside of the state.” If the original act itself was intended to apply to through shipments between points in this state and points in other states, it is difficult to see how it could have been evaded by increasing such rates.

It is plain, therefore, that the legislature understood and construed the original act as applicable only to local or state commerce, and sought by the supplemental act above mentioned to induce railroad companies to bind themselves by contract not to increase their charges upon interstate commerce for the purpose of making up for their losses under the law upon state commerce.

If, however, the statute shall be held by its terms to apply to interstate commerce, I am of the opinion that it is in contravention of article 1, § 8, of the constitution of the United States, which confers upon congress the power “to regulate commerce with foreign nations and among the several states.” The question is one of great importance, and, in some of its aspects, not free from difficulty. It has been much dis-

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cussed in the courts of the country, and especially in the supreme court of the United States.

The following propositions may now be laid down as settled, at least so far as the federal courts are concerned:

(1) The transportation of merchandise from place to place by railroad is commerce. (2) The transportation of merchandise from a place in one state to a place in another is "commerce among the states." (3) To fix or limit the charges for such transportation is to regulate commerce. (4) A statute fixing or limiting such charges for transportation from places in one state to places in other states is a regulation of commerce among the states. (5) The power to regulate such commerce is vested by the constitution in congress. (6) This power of congress is exclusive, at least in all cases where the subjects over which the power is exercised are in their nature national, or admit of one uniform system or plan of regulation. (7) The state cannot adopt any regulation which does or may operate injuriously upon the commerce of other states.

These general propositions are abundantly sustained by the following, among other, authorities: *Crandall v. Nevada*, 6 Wall. 35; *Passenger Cases*, 7 How. 283; *Gibbon v. Ogden*, 9 Wheat. 1; *Case of State Freight Tax*, 15 Wall. 232; *Welton v. Missouri*, 91 U. S. 279; *Hall v. De Cuir*, 95 U. S. 497; *Railroad Co. v. Husen*, id. 469; *Pensacola Tel. Co. v. West-ern, etc. Tel. Co.* 96 U. S. 9; *Carton v. Ill. Cent. R. Co.* (Sup. Ct. Iowa) 13 N. W. Rep. 67.

It is insisted by plaintiff's counsel, in his very able and exhaustive argument in this case, that, conceding the soundness of these propositions, the statute in question may be upheld upon the ground that in enacting it the state exercised a power which is vested concurrently in the states and the general government. That certain powers may be exercised by the states in the way of regulating interstate commerce, where no act of congress is interfered with, may, for the purposes of this case, well be admitted.

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Assuming such to be the law, the questions remain:

(1) Whether the act in question, if applied to through shipments, or freight upon lines extending into or through several states, must not be held to relate to a subject which is in its nature national, or which admits of one uniform system or plan of regulation. (2) Whether, if the power of the state to pass such an act be conceded, it does not necessarily include the power to discriminate against the commerce of other states.

If either of these questions is answered affirmatively, then the statute, in so far as it relates to through shipments over interstate lines, is in violation of the federal constitution. I am of the opinion that both questions must be so answered.

It seems very obvious that the regulation of transportation of merchandise over a line extending, it may be, from the Atlantic to the Pacific ocean, is a subject which is in its nature national. It is so because it necessarily concerns the people of the whole country, and is beyond the legislative power of any single state. It is also apparent that such transportation not only admits of, but requires, a uniform system or plan of regulation. I do not understand the plaintiff's counsel as denying these propositions; but he insists that this state may regulate charges upon so much of the route as lies within its own territory. In other words, the contention of counsel is that each state over whose territory a line of interstate railroad passes may fix or limit the charges to be made for the carriage of a cargo upon that part of the route which lies within its own jurisdiction.

The consideration of the proposition involves a determination of the second question last above stated, viz., whether the statute in question, construed as authorizing the regulation of charges within this state, may not affect charges made for carriage in other states. To state the question in another form, it is this: Can each of the states through which a cargo must pass in going, for example, from Des Moines to New York city, fix the proportionate charge which shall be made by

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the carrier for the distance within its own territory? Such a line would pass through portions of the states of Iowa, Illinois, Indiana, Ohio, Pennsylvania and New York. How can Iowa fix the amount to be paid for the carriage from Des Moines to the state line without indirectly affecting the rates to be charged in the other states? It must be borne in mind that the power to regulate includes not only the power to reduce, but the power to increase charges. If one of the states upon such a line can fix the charges for carriage within its own territory, what is to prevent it from authorizing its own carriers to demand and receive an undue and unreasonable proportion of the gross amount? If the proposition contended for be admitted, what is there to prevent the three states through which the cargo must first pass on its way to New York from exacting more than one-half of the charge for the entire route? or, to state the same question in another way, why may not the five states through which the cargo may pass before reaching the boundary of New York exact in the aggregate the whole of a reasonable charge for the entire route, leaving nothing for the carrier within the state of New York? And since no state law can have any extraterritorial force, is it not clear that the attempt to enforce the statutes of each of the several states, in so far as the carriage within such state is concerned, would lead to conflicts and disputes which no state authority would be competent to adjust and determine.

These considerations, I think, lead inevitably to the conclusion, not only that such commerce is the subject only of national control and regulation, but that any attempt to devolve upon a single state the power to regulate it in part would necessarily give to such state the right to discriminate against other states of the Union.

It is well known that one of the chief reasons which caused the constitutional convention to insert the commercial clause in the constitution of the United States, was the belief that if the power to regulate commerce among the states

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was not taken exclusively into the hands of the national government, rivalries and jealousies would arise among the states similar to those which had existed under the old confederation, which would lead practically to the destruction of interstate commerce, and it was regarded as specially important that no power in the legislature of any one state to interfere with commerce or trade in any other state should be recognized as existing.

My conclusion is, therefore, that the statute in question, if held to apply to interstate commerce, is in violation of the constitution of the United States. In this view I am supported by the recent decision of the supreme court of this state (*Carton v. Ill. Cent. R. Co.*, *supra*), in which the act now under consideration was held to be unconstitutional. If I were in doubt upon the subject, I should not hesitate to follow that ruling.

I am not aware that the federal courts have ever in the course of our history undertaken to enforce a state statute which has been held void by the supreme judicial authority of the state. I should hesitate long before undertaking to enforce in this tribunal any act of the state legislature which the supreme court of the state has held, for any reason, to be null and void. To do so would be to give to suitors who can come here an unjust advantage over the citizens of the state who are compelled to submit their rights to the determination of the state courts.

The demurrer to the answer is overruled.

GOULD v. CHICAGO, M. & ST. P. R. CO.

(*District of Minnesota. June, 1883.*)

1. **EJECTION OF PASSENGER FROM TRAIN.**—A person on a train refusing to produce a ticket or pay his fare, subsequently changing his mind, and tendering full fare, would be entitled to continue his journey on the train. But if the refusal be accompanied by violent and abusive

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conduct, whereby the conductor is compelled to stop the train for the purpose of putting him off, he may forfeit such right to remain on the train, and the conductor, using proper discretion, may eject such person, notwithstanding tender of full fare is then made.

At law.

The plaintiff Gould was ejected from the cars of defendant's railway at Union Park, a regular passenger station between Minneapolis and St. Paul. He claimed that he purchased a ticket and boarded the train at the passenger depot in Minneapolis, and, on request, surrendered his ticket to the conductor, who subsequently demanded his fare, and on refusal of payment put him off.

The testimony was contradictory upon all the material facts. The plaintiff testified that when the conductor stopped the train at Union Park station and commenced to put him off, he offered the price of a ticket. The evidence on the part of the defendant was to the effect that the plaintiff boarded the train after it left Minneapolis, and, when requested by the conductor to give up his ticket, declared that he had already done so, and upon a denial thereof by the conductor, and a further request for his ticket or his fare, refused to deliver up either, became abusive and violent, and that thereupon the conductor put him off the train.

C. K. Davis and J. N. Granger, for plaintiff.

Bigelow, Flandrau & Squires, for defendant.

NELSON, *District Judge*, after a statement of the matters at issue, and calling the attention of the jury to the law defining the rights of the public and the duties of railroad companies, *inter alia*, charged the jury that unless a person unlawfully on the train had, by his improper conduct, compelled the conductor to stop it for the purpose of putting him off, and persisted in his refusal to pay fare from the place where he boarded the train, and became violent and abusive, until the conductor had to resort to extreme measures,—as,

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for instance, by force pull him from his seat,—he might change his mind, and if full fare was tendered the conductor was bound to receive it; and if he put him off after such tender the railway company is liable.

The jury found a verdict for the defendant.

BAKER MANUF'G CO. v. WASHBURN & MOEN MANUF'G CO. and another.

(Southern District of Iowa. September, 1883.)

1. PATENT-RIGHT — LICENSE — INJUNCTION, WHEN DISSOLVED, WHEN GRANTED.— The complainant is the licensee of a certain patent-right owned and controlled by the defendants. The license stipulated that the royalty to be paid by the complainant should be no greater than that charged to any other licensee. The complaint avers that the defendants charge one H., another licensee of the same right, a royalty smaller than that charged the complainant. It is further averred that the defendants threaten to annul the complainant's license for non-payment of the royalty originally fixed therein, and also to sue the complainant for infringement of the patent because of such non-payment. On a motion to dissolve a preliminary injunction obtained against the defendants, it was *held* (1) that, in so far as the injunction restrained the defendant from suing to recover the royalty provided in the complainant's license, it must be dissolved, because the complainant has an ample defense, and a plain, speedy and adequate remedy at law; (2) that so much of the injunction as restrains the defendants from declaring the complainant's license forfeited for non-payment of the royalty at the rate originally fixed therein, should remain in force, as the damages resulting to the complainant from a public declaration of the forfeiture could not readily be ascertained and compensated in money.

On motion to dissolve or modify injunction.

The complainant is a corporation engaged in the manufacture of barbed wire under a license from the defendants, who are the owners of certain letters patent covering not only the product itself, but also machines for manufacturing

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the same. Among other things the said license provides as follows:

"The royalty to be paid under this license shall not be greater than that charged to any other party licensed after the first day of January, A. D. 1881, under the said several letters patent, or any of them hereinbefore mentioned by date and number, by said Washburn & Moen Manufacturing Company; that is, if said Washburn & Moen Manufacturing Company shall hereafter conclude to and does license any other party or parties, during the continuance of this license, to manufacture and sell barbed fence wire in the United States and territories under said letters patent, or any of them hereinbefore mentioned by date or number, at a less sum per pound than three-fourths ($\frac{3}{4}$) of a cent, then and thereafter the royalty to be paid by said Baker Manufacturing Company to said Washburn & Moen Manufacturing Company under this license shall be the same as such reduced royalty."

The bill avers that since the execution of said license the defendants have executed to one Jacob Haish, of Chicago, Illinois, a contract of license, whereby the said Haish is to pay no royalty or license fee for the first four thousand tons of wire to be manufactured and sold annually by him, and that for the second four thousand tons the said Haish is to pay a royalty or license fee of fifty cents per hundred pounds only, and that ever since the granting of said license the said Haish has continued to manufacture and sell barbed wire by virtue thereof; by reason whereof the plaintiff claims to be entitled to have its license so modified as to conform the royalty to be paid to that specified in the license given to said Haish.

It is averred that since discovering the existence and terms of the contract between defendants and said Haish, complainant has paid royalty only under protest, and has demanded a modification of its license, which defendants refuse to make or grant; also that defendants threaten to annul

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plaintiff's license if plaintiff ceases to make payments of royalty as therein provided, and to bring suit against it for infringement of the patent owned and controlled by them. The prayer of the bill is as follows:

"Wherefore plaintiff prays that a decree of this court may be entered herein adjudging that plaintiff's said license be so modified as to conform in the royalty to be paid to the license so granted by defendants to said Jacob Haish. That pending this suit an injunction issue restraining said defendants, or either of them, or their agents or attorneys, from annulling or attempting to annul or revoke said license until the final decree shall be entered herein, and further restraining said defendants, or either of them, or their agents or attorneys, from instituting any suit or action against the plaintiff by reason of its failure to pay the royalty provided for in and by said license, and for such other and further relief as to equity and good conscience may seem meet, and costs."

Wright, Cummins & Wright, for complainant.

Lehman & Park, for respondent.

McCREARY, *Circuit Judge*. — 1. The preliminary injunction is broad enough in its terms to restrain the defendants from annulling, or attempting to annul or revoke, the complainant's license for any cause whatever, and it, therefore, goes beyond the scope of the bill. The purpose of the bill is to prevent a cancellation of the complainant's license, because of its refusal to pay a higher royalty than that exacted by defendants from Haish. The mandate of the writ should go no further than the allegation of the bill, and it will be modified accordingly.

2. In so far as the injunction restrains the defendants from instituting any suit or action against complainant to recover the royalty provided in the license of complainant, it must be dissolved, for the reason that it is wholly unnecessary for

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the protection of complainant's rights. If the allegations of the bill be true, the amount of royalty to be paid by complainant has been reduced by the action of defendants in granting license to another at lower rates, and, this being so, the complainant is only bound to pay or tender the reduced rates and its license will remain in full force. If sued for such royalty, its defense at law is ample, and its remedy plain, speedy and adequate. It needs no affirmative aid from any court, either of law or equity, to enable it to defend. It can protect its rights by its own action in complying, or offering to comply, with the terms of its contract. The defense of such a suit would be that of a tender of payment or satisfaction in full of the demand sued upon; and it will not, of course, be claimed that the aid of a court of equity is required to establish it. *Florence Sewing Machine Co. v. Singer Manuf'g Co.* 8 Blatchf. 113.

3. We think that so much of the injunction as restrains the defendant from declaring a forfeiture of the complainant's license for non-payment of royalty at the rate originally fixed therein should remain in force. A public declaration of such a revocation might greatly injure the business of the complainant, and the damages could not readily be ascertained and compensated in money. It would destroy, in a great measure, confidence in the right and title of complainant, and thus disable it from making sales. Persons dealing in patented articles must be able to assure the public that they have a clear right to do so, in order to secure patronage, since both seller and buyer may be liable in damages if the article is sold in violation of the rights of the owner of the patent right. Upon this point we concur in the views expressed by the supreme judicial court of Massachusetts in *Florence Sewing Machine Co. v. Grover & Baker Sewing Machine Co.* 110 Mass. 1.

Let an order be entered in accordance with this opinion.

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BOARD OF COM'RS OF LEAVENWORTH CO. v. CHICAGO, R. I.
& P. R'Y CO.

(*Western District of Missouri. November, 1883.*)

1. **LACHES — STATUTE OF LIMITATIONS — CONCEALED FRAUD.**— It is well settled that where the facts alleged in the bill disclose laches on the part of the complainant, the court will refuse relief on its own motion, even where the defense of laches is not pleaded. *Sullivan v. Portland, etc. R. Co.* 94 U. S. 806.
2. **SAME — DEFENSE OF LACHES ON THE GROUND OF FRAUD.**— To take advantage of the exception provided for in a case of concealed fraud, where otherwise a party would be barred by reason of his laches or the statute of limitations, it must be made to appear that the fraudulent transaction from which relief is prayed was one which concealed itself, or at least the allegations and proof must be such as to satisfy the court that the complainant could not have known of the facts constituting the fraud by the exercise of proper diligence and care.
3. **SAME — WHAT DEEMED TO BE NOTICE.**— Whatever is sufficient to excite attention and put the party on his guard and call for inquiry is notice of everything to which this inquiry would have led. When a person has sufficient information to lead him to a fact he shall be deemed conversant with it. *Martin v. Smith*, 1 Dill. 96.
4. **SAME — MISSOURI STATUTE OF LIMITATIONS.**— Section 3230, St. Mo. 1879, providing that actions for relief on the ground of fraud shall be commenced within five years from the time when the cause of action accrues, "the cause of action to be deemed not to have accrued until the discovery by the aggrieved party, at any time within ten years, of the facts constituting the fraud," commented upon and approved by the court.

In equity.

Bill in equity, alleging, among other things, that articles of consolidation entered into between two railroad corporations on the twenty-fifth day of September, 1869, were fraudulent and void, and praying, with other relief, that the same be set aside. The complainant was a stockholder in one of the constituent companies. The bill shows that the consolidated company issued bonds to the amount of \$5,000,000, secured by mortgage upon the road and prop-

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erty of that company, derived from the consolidation; that said mortgage was afterwards foreclosed, and the property sold under the decree of foreclosure, and that the respondent afterwards, through several successive consolidations, acquired the property. The first consolidation and all subsequent proceedings are attacked by the bill as fraudulent and void. The hearing was upon exceptions to the answer.

John F. Dillon and Geo. W. Kretzinger, for complainant.

Thos. F. Withrow, M. A. Low and J. D. S. Cook, for respondents.

McCARY, *Circuit Judge*.—Counsel have discussed at the bar numerous questions, and among them that of the effect of the statute of limitations, and of the alleged laches of the complainant in delaying the commencement of these proceedings. The articles of consolidation between the Chicago & Southwestern Railway Company, in Missouri, and the Iowa corporation of the same name, were entered into on the twenty-fifth day of September, 1869, and this bill was not filed until the twenty-fifth day of September, 1892. In the mean time, as the bill avers, the consolidated company had executed bonds to the amount of \$5,000,000, secured by a mortgage upon the road, which mortgage had been foreclosed, and, under the decree of foreclosure, the property had been sold.

The question is whether this long delay has been or can, under the circumstances, be justified or excused. Although there are no exceptions to that part of the answer in which this defense is pleaded, yet it was proper for counsel to discuss it, and for the court to consider it, as it arises upon the facts as they are stated in the bill. It is well settled that where the facts alleged in the bill disclose laches on the part of the complainant, the court will refuse relief on its own motion, even where the defense of laches is not pleaded. *Sullivan v. Portland, etc. R. Co.* 94 U. S. 806.

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And as the defense of the statute of limitations proper, as well as that of laches, is pleaded in the case, we think that both may properly be considered at this time, in so far at least as they depend upon the facts disclosed upon the face of the bill.

The questions to be considered are: (1) Is the suit barred by the laches of complainant? (2) Is it barred by the statute of limitations of Missouri?

It must be conceded that both these questions should be answered affirmatively, unless the case falls within the exception recognized in cases of concealed fraud. The averment of the bill relied upon as bringing the case within this exception is as follows:

"All which acts of pretended organization, consolidation, executing of bonds and trust deed, foreclosure, and sale under the same, and all the other unlawful and fraudulent acts hereinafter recited, were without the knowledge, privity or consent of your orator, and have only during the present year come to its knowledge, and your orator ought not to be concluded or estopped thereby from a thorough and adequate remedy."

That this is not a sufficient allegation that the fraud was concealed from the complainant, and therefore not discovered at an earlier date, is entirely clear. In order to determine what allegations of concealment will be sufficient in cases of this character it is important to consider the nature of the alleged fraudulent transaction and the character of the acts alleged to have been fraudulent. Some fraudulent acts are such as to conceal themselves. If, for example, a trustee render false accounts to his *cestui que trust*, and the latter has no means of knowing the true state of such accounts except as informed by the former, a court of equity would no doubt hold that the transaction was of a character to conceal itself, and would therefore hold it unnecessary to allege or prove any affirmative acts of concealment. The same would be true of a conveyance of property purporting

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on its face to be a sale for an adequate consideration, but which, by a secret agreement between vendor and vendee, is without consideration, or made to hinder or defraud creditors. In such cases the fraud is concealed by not being divulged; all the acts of the parties in connection with the fraudulent transactions being in the nature of fraudulent concealment. See *Bailey v. Glover*, 21 Wall. 342, and cases cited. But where, as in the present case, the transaction complained of is the consolidation of two *quasi* politic corporations, made, or attempted to be made, under and by virtue of authority conferred by a public statute, by proceedings had and entered of record upon the books of the respective corporations, and by deeds of conveyance executed and recorded in the several counties and filed in the office of the secretary of state, it is difficult to see upon what ground the transaction can be regarded as one which conceals itself. On the contrary, the court would be inclined to hold that the stockholders of the respective corporations are charged with notice of the proceedings, and bound to proceed with reasonable diligence to annul them. And, however this may be, they cannot stand by for a series of years, making no sign of discontent, while other innocent parties invest their means upon the faith of the validity of the consolidation. *Brown v. Buena Vista Co.* 95 U. S. 160.

At all events, it would require very distinct allegations of affirmative acts of a fraudulent concealment to justify a court of equity in entertaining such a case, and if such allegations were made in a form to be regarded as sufficient upon their face, this court would be inclined to direct that the case be set down for hearing upon the sufficiency of the defense of laches and lapse of time upon evidence before requiring the parties to go to their proofs upon other questions. In the very nature of the case the consolidation of the two railroad companies in question must have been a transaction quite public and notorious in its character, and well known to the public, and especially to the stockholders in the re-

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spective corporations and others pecuniarily interested. The fact that the line known as the Chicago & Southwestern Railway has become, by successive consolidations, a part of the Chicago, Rock Island & Pacific Railway, and has been for years operated by that company, is a fact very notorious, and it would take a very strong showing to convince us that the authorities of the county of Leavenworth were kept in ignorance of it, or of the several steps by which it was accomplished, during a period of thirteen years. It is said, however, that the complainant may have had notice of the fact of consolidation, but not of the facts rendering the consolidation fraudulent. No doubt the question in all such cases must be, not whether complainant had knowledge of the act complained of, but whether he knew, or might, by proper diligence, have known, of the facts constituting the fraud. But what are the facts constituting the alleged fraud in the present case? The principal allegation is that the consolidation was fraudulent and void because the constituent corporations were without power to consolidate. There is also an allegation that the consolidated company issued stock in excess of the amount authorized by law; but this latter fact would not, if proved, affect the validity of the consolidation. Can the defendant be heard to plead its ignorance of the powers of the corporation of which it was a member? We think it was bound to know what those powers were; and if it were not, it would be held bound, in such a case as this, to make inquiry within a reasonable time after the act complained of, and would be held to such knowledge as it might acquire by such inquiry. "Whatever is sufficient to excite attention, and put the party on his guard and call for inquiry, is notice of everything to which the inquiry would have led. When a person has sufficient information to lead him to a fact, he shall be deemed conversant with it." *Martin v. Smith*, 1 Dill. 96, and cases cited.

The complainant knew, or should have known, that the corporation in which it was a stockholder had been consoli-

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dated with the Iowa corporation. It also knew, or might have ascertained, the terms of the consolidation, and whether it was within the powers of the corporation to enter into it. Having notice of these things, and being advised that large sums of money were about to be raised by the consolidated company, to be secured by mortgage upon the road, and expended in its completion and equipment, it is impossible to hold that it was not guilty of laches in waiting thirteen years, and until a valuable property had been built up and large interests acquired upon the faith of the validity of the consolidation, before instituting these proceedings. An examination of the allegations of the bill will not only show that there are no allegations of concealment such as the law requires, but, moreover, that the acts complained of were such as could scarcely have been unknown to or concealed from the complainants. Whether there was power to consolidate was a question of law, arising upon the construction of a statute. The assumption of power to consolidate could not constitute a concealed fraud. It may have resulted from a misconstruction of the statute, but, if so, the complainant knew it, or might have known it, at the time of the consolidation. The same is true as to the overissue of stock, although, as already stated, that fact, if proved, would not render the consolidation void.

We conclude, therefore, (1) that the bill does not show a case of concealed fraud; and (2) that it does show laches on the part of complainant.

In considering these questions we have confined ourselves to the allegations of the bill respecting the original or first consolidation complained of, for the reason that it is conceded by counsel for complainant, and is beyond dispute, that the complainant's right to the relief sought in this case must depend upon the determination of the question whether it can successfully attack that transaction.

It is insisted that the defense of laches cannot be interposed where the transaction assailed is void, and not merely

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voidable. We are not aware of any authority for this distinction. If the complainant has been guilty of laches, a court of equity will not look into the transaction at all. It will refuse its aid upon the ground that nothing can call it into activity but conscience, good faith and reasonable diligence. These wanting, the court will remain passive and do nothing. It will not inquire whether the transaction complained of was void or voidable. It will leave the parties where it finds them. The conclusion already reached renders it unnecessary to consider the defense of the statute of limitations proper. There is, however, one view of the statute which, if adopted, would require us to hold the present suit barred, independently of the question whether there was concealed fraud.

The Missouri statute provides that actions for relief on the ground of fraud shall be commenced within five years from the time when the cause of action accrues, "the cause of action in such case to be deemed not to have accrued until the discovery by the aggrieved party, *at any time within ten years*, of the facts constituting the fraud." St. Mo. 1879, § 3230.

This statute, by its terms, requires the injured party, at his peril, to discover the fraud within ten years. According to the allegations of the bill, the alleged fraud in this case was not discovered until after the expiration of ten years. The allegation is that the fraud was discovered within the year preceding the filing of the bill, which would fix the time of discovery more than twelve years after the consolidation. We are not aware that this provision of the statute has ever been construed by the supreme court of this state, but it was discussed by this court in *Martin v. Smith*, *supra*, and the conclusion was reached that its effect is to bar a suit for relief on the ground of fraud, where the fraud is discovered after the expiration of ten years. While this court would not be inclined to adopt and follow a state statute of limitations which makes no exception with respect to cases of con-

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cealed fraud, we should feel bound to adopt and follow the statute in question upon the ground that it grants a reasonable time within which the discovery shall be made. The highest interests of society demand that there should at some time be an end of litigation, and the statute in question was doubtless enacted in view of this demand, and to prevent the prosecution of stale claims. Without the limitation which this statute contains, it has often happened that suits on the ground of concealed fraud have been brought many years after the transactions, upon the ground of recent discovery, and courts have felt constrained to entertain them, notwithstanding, by reason of the lapse of time, witnesses may have died, papers and proofs been lost or destroyed, and the rights of innocent third parties become involved. In the light of experience we cannot say that the statute in question, giving ten years and no more in which to make the discovery, is not reasonable and just. We think it is one which a federal court of equity, sitting within the state of Missouri, should adopt and follow, and upon this ground we should feel bound to hold the present suit completely barred, independently of the other questions discussed in this opinion.

As the defenses of laches and the statute of limitations must be sustained, it would be a waste of time and labor to examine the other questions discussed by counsel at the bar, and therefore, without considering them, we overrule the exceptions to the answer.

KREKEL, *District Judge*, concurs.

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(*District of Minnesota. October, 1883.*)

1. **PERSONAL INJURY — WHO IS A PASSENGER.**—The plaintiff, while traveling in a freight train on the defendant's road, was injured by a collision. The defendant provided a surgeon, but there is a conflict of testimony as to the advice and treatment rendered the plaintiff.

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iff by him. The plaintiff seeks compensation for the injury. The only question at issue is the amount of damages for which the defendant is liable. The court, in charging the jury, held, that if the plaintiff was on the car in which the defendant allowed people to travel, with the knowledge of the defendant or of any of its agents, for the purpose of being transported, and was properly there, he was a passenger; and the defendant was bound to use all fair means in its power to transport him safely. Whether the plaintiff had a ticket or not was immaterial. The defendant is liable for any negligence on its part whereby the plaintiff was not transported safely.

2. **SAME—NEGLIGENCE OF ATTENDING SURGEON—RESPONSIBILITY OF RAILWAY COMPANY.**—A railroad company having assumed to furnish a surgeon for passengers injured thereby, its duty to the plaintiff is discharged when it provides a surgeon possessing only ordinary skill; and for any damage caused the plaintiff by the negligence of such surgeon, the surgeon, and not the defendant, would be responsible.
3. **CONTRIBUTORY NEGLIGENCE—BURDEN OF PROOF.**—That for any neglect of the plaintiff after the injury sustained, causing additional damage to himself, the defendant would not be liable. The burden of proving contributory negligence on the part of the plaintiff is upon the defendant.
4. **MEASURE OF DAMAGES.**—That in estimating damages the jury should consider the loss of time and the suffering caused the plaintiff in the past, and that which will probably be caused him by the injury in the future; also, the injury to his health and bodily strength, including in the latter the effect the injury might have had upon his ability to labor, both in the past and in the future.

This was an action brought to recover damages for injuries received by plaintiff in a collision which occurred on the defendant's road. There was no dispute as to the fact of the collision, nor that the plaintiff was injured thereby; but the conflict arose as to the amount of injury to the plaintiff for which the defendant was liable. The testimony upon that point was in conflict. The plaintiff's testimony was to the effect that his collar-bone was broken in the collision, and was set by a surgeon sent there for that purpose by the railroad company; that in obedience to the orders of the said surgeon he went the next day to St. Paul, and remained under his care for the space of nineteen days; that at the end of that time, believing that the bones were

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not united, he went to the said surgeon's office, who, after examination, said it was all right, and that the injured shoulder was as good as the other one. Plaintiff then asked him if he could return to his home in Canada the next day, a two-days' journey, and the doctor answered in the affirmative; that relying on all these statements he left St. Paul the next day, and on arriving home consulted his physician, who found that there was no bony union formed; that he has suffered great pain and partial loss of the use of said arm ever since. On the part of the defendant, the attending surgeon for the railroad company stated that when the plaintiff came into his office he was very nervous, and stated that he believed his shoulder was broken; that he examined the fracture; he told the plaintiff that his arm was doing well, but would require two weeks more time, and that he could not leave for two weeks; that he removed the bandages, put the plaintiff's arm in a sling, and told the plaintiff to return to the hotel, and that he would call the next day and replace the bandages; and that on his coming the next day to do so he found that the plaintiff had started for Canada. Medical witnesses for the plaintiff deposed that on the plaintiff's arrival in Canada there was no bony union, but merely a ligamentous one. The attending surgeon stated that at the time the plaintiff left St. Paul a bony union was in process of formation. On the trial of the case the experts, after an examination of the plaintiff, stated that a bony union had then formed; that there was a lapping of the bones, and a bending, but that the same was not serious.

C. K. Davis, for plaintiff.

Bigelow, Flandreau & Squires, for defendant.

SHIRAS, *District Judge (charging jury)*.—In the case which is now before you the plaintiff, Horatio Secord, seeks to recover from the defendant, the St. Paul, Minneapolis & Manitoba Railroad Company, damages for injuries alleged to

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have been received while he was a passenger upon the cars of the defendant company on or about the twenty-eighth of May, 1882. The damages claimed in the case amount, I believe, to the sum of \$10,000.

I have been asked to instruct you upon the question of the position that the plaintiff occupied towards the defendant when he was in the caboose at the time he received the injury. Now, the undisputed evidence in the case, and the admissions of the defendant, show that the plaintiff had gone upon the cars of the defendant company for the purpose of being transported over the line of its road to some given point upon that road, and that he had some merchandise, and some teams and farming implements, and other matters of merchandise, upon this train. He was directed, according to his testimony, to get upon this train as the proper one to proceed upon towards the place of his destination. The undisputed evidence shows at the time of the accident there was a caboose, as it is sometimes called, or car that was used upon these freight trains, when people are permitted to travel in them at all. If the plaintiff was on that car with the knowledge of the defendants, or any of its agents, for the purpose of being transported over the line of its road, and was properly there, he was in the position of a passenger, and occupied the position of a passenger; and it is immaterial whether or no he had a ticket, and whether or no he had, at the time of the accident, paid his fare. These things would not defeat his being a passenger, because it is evident that at the time he got upon the train for the purpose of being transported upon it he might have had a ticket, and the conductor might not have got round to him to collect his fare or ticket. In consideration of his being transported by the defendant as a passenger, the defendant has a right to collect fare therefor, and the mere fact that the plaintiff might not have handed his ticket over to the conductor, provided he had one, or might not have actually paid his fare, would not defeat his right or claim that he was a passenger. Of

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course, I am ruling this upon the facts of this particular case, as they are before you, upon which there is no claim made but what the plaintiff was going upon the cars of this company for a proper purpose. There are sometimes cases that arise from persons going upon the cars of a company when they are stealing a ride, in which the payment or non-payment of fare might become material, and in cases of that character a different rule may obtain. But in this case, as a matter of law, I instruct you that if the plaintiff was on the cars to be transported thereon, the fact as to whether or no he had a ticket makes no difference; he was a passenger, and that would create a liability between the plaintiff and this defendant, and the obligation that arises from the railroad company defendant towards its passengers. In other words, there would be then imposed by that fact upon the defendant corporation the duty and obligation of safely transporting the plaintiff as a passenger, because this railroad company has engaged, among other things, to convey passengers; and as far as passengers are concerned, the defendant, being in the business of conveying them, is bound to exercise a high degree of care and diligence towards them with regard to providing them with safe transportation. The duty is imposed upon railroads of safely transporting their passengers, and the law, as applied to carriers, compels them to use a high degree of care in seeing that their passengers are safely transported, and it is their duty to see that their tracks are in proper condition and properly cared for, and that the trains are in proper order and properly run, etc.

If there is any negligence on the part of the railroad company, by reason of which a passenger is injured, then the passenger has a right to claim his damages that are caused thereby from the railroad company. On the other hand, if an accident happens from something that is not the fault of the railroad company, and something beyond its control, and no negligence can be attributed to it at all,

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in that case it would be a pure accident, and, in the older language of the law, it might be attributed to the act of God, and the company would not be responsible.

Now, then, gentlemen, what do you find the facts to be under the evidence in this case? Was this plaintiff a passenger upon the train? If so, he was entitled to be safely transported, and the duty lay upon the company to use all fair means in its power to carry him and transport him safely over the line of its road. There is no dispute as to the time or fact of the accident, and that the plaintiff was injured. Was that fact the fault of the railroad company? Was that caused by negligence or want of care on the part of the railroad company? If you find from the evidence that the accident was caused through the fault or negligence of the company, and that by reason of that there was a failure to carry out its contract for safe transportation, and the accident happened, and injury was caused thereby to the plaintiff, then, under the law, the plaintiff would be entitled to recover for the injury sustained by him. In case you so find, you will apply the rule of damages that applies to cases of this character, as to which I will instruct you. But before I pass to the general rule that is applicable to this case as to the general elements of damages, there are one or two other questions to which I will invite your attention.

A question has arisen, and has been made in the progress of this case, in regard to the consequences to the plaintiff of this accident, growing out of the question whether it is all attributable to the accident itself that happened upon the railroad company's line, or whether the injury to the plaintiff has been aggravated by any surgical or medical treatment received after the injury was inflicted upon him. The facts show that Dr. Murphy, a physician and surgeon employed by the company and under its pay, took charge of the case of this patient. I do not say immediately, for there was another physician, but we may drop him out of the question. The plaintiff in the first place came down to

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St. Paul, and was under the care and charge of Dr. Murphy. The evidence shows, and there is no dispute upon that, that Dr. Murphy was the surgeon of this defendant railroad company; and the proposition upon which I propose to instruct you is whether the company would be responsible for any damage or injury caused to the plaintiff, or any aggravation of the injury received through any neglect on the part of Dr. Murphy in the performance of his duty in the case. Upon that proposition the law is this: that this railroad company, having assumed to furnish a physician—a surgeon,—it has taken upon itself the duty and obligation of furnishing a competent surgeon, and not beyond that. If it assumes the responsibility of engaging a surgeon, and placing him in charge of parties that may be injured, and sending him to their aid, so that these parties may place themselves under the care of this physician or surgeon, then it is responsible thus far: that the person it selects must be a competent man; he must be reasonably fitted for the duties which he is called upon to perform. In other words, it will not do for the company to take up some incompetent man, who is not fit by education or experience to undertake the responsibilities of any case that may be placed in his hand. If it does engage a physician and surgeon who is sufficiently experienced, that is all that can be expected of the railroad company, and is all of its liability.

It must be remembered that the company is not obliged to engage the very highest and best talent that can be engaged, but it must engage a man who is reasonably competent in his profession, so that he would be an ordinarily competent man, having ordinary knowledge and skill to perform the duties placed upon him. These are the duties that are assumed by the company. A competent man being in the employ of the company, his services are offered by the company to attend to the injured party. The person that is injured is not compelled to accept his services; he may prefer to go elsewhere. There is a difference between

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a person whose services are offered, that may or may not be accepted, and a conductor or brakeman that is put on the train, and whose services we must accept. When a man goes upon a train he has no choice about the conductor, brakeman, or anything else. The company assumes that they are responsible for the performance of their duty in such respects. But with regard to a surgeon of that character, the plaintiff could have refused to take him as his surgeon, and could have taken any other surgeon, as he deemed it best to do. So that, as I have instructed you, the duty of the company is performed, and it has performed all that the law requires, when it furnishes a competent man, and he is ordinarily competent for that duty.

Now, he may be an ordinarily competent man, and yet in the attendance upon any particular case that he undertakes he may be negligent. He may be negligent in that particular case, and neglect his duty therein, though he may generally be ordinarily competent. If that be true, and you so find the facts to be in this particular case, that when treating the plaintiff as a physician and surgeon Dr. Murphy was negligent in the performance of his duty,—if you should find that from the evidence,—then you must determine whether Dr. Murphy was a competent man, and was a proper and responsible surgeon for the company to engage as such; and if you find that the company performed its duty in that regard, that is all that could be required of it.

If, on the other hand, he was an incompetent man (I don't understand, however, that that is claimed under the evidence in this case), then there would be a responsibility resting upon the company; but if he was competent, and then he was negligent in what he did in that particular case, then he himself is responsible for the damage caused thereby. If he did not properly treat the plaintiff in this case, and failed to do his duty in this instance, and thereby the injury to the plaintiff has been increased, for the damage caused by this negligence, if any, Dr. Murphy is responsible himself; the

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liability would be upon him, and he would be liable to the plaintiff in damages, if you should find those were the facts. But the company would not be liable, because it had performed all the duty that is incumbent upon it when it selected a proper and competent man, and held him out for these parties to employ if they saw fit. Therefore, upon this first proposition, it is for you to determine whether this Dr. Murphy was a proper and competent man, and had the proper amount of ordinary skill to perform the duties required of him. If not, the company would be responsible for the consequences. But if you find, under the evidence, that Dr. Murphy was a competent and proper man, and the company was not at fault in engaging his services, the question would be, was he negligent in that particular instance? Upon that point, if the evidence satisfies your minds that he was negligent, and that by reason of such negligence and want of care he increased the damage of the plaintiff, the company would not be responsible for the increased damage, but the plaintiff must for that damage look to Dr. Murphy himself.

Now there is another proposition presented, and I am requested to charge you upon it, and that is as to any increased damage caused to the plaintiff by the negligence of the plaintiff himself, if any there is. You will understand that in charging upon these propositions I am not stating propositions of fact; the facts you are to pass your opinions upon; I am only expressing my views of the law to you. The duty is placed upon all parties situated as the plaintiff was, who receive an injury in that way, when they are being transported by a railroad company,—the duty is placed upon them to exercise due care upon their part after receiving the injury. The same rule applies to them that applies to all ordinary cases. Now it is well settled in all ordinary cases that the duty and obligation is laid upon the party who receives the injury to see that the amount of damage is not increased by any negligence or want of care on his part.

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To use an illustration that comes to my mind: take the case, for instance, of a man who has an insurance policy upon his stock of goods, and a fire happens. He has a right to recover of the company for remuneration to the amount of his policy. But a duty is placed upon him to see that the damage is not increased in any way; in other words, he must do all that he can to protect his goods, and do all that he can to save them from injury. It would not do for him to abandon them because his stock of goods is insured, and because they are partly destroyed, simply say, "I have got an insurance that covers them," and leave them to be burned. The duty is upon him to keep the damages down as low as possible. The same rule applies to all cases of the kind. If the plaintiff was injured, and he had a right to look to the company for damages that were caused to him, still he must use care in the matter of that injury. He must not be careless, and he must not do anything that will increase the injury to himself by his own fault and negligence; in other words, he must use due care. Therefore, if it be true that the plaintiff, by negligence on his part, did increase the amount of damage and injury he received, then for that additional damage he cannot hold the company responsible, though they might be responsible for the first accident, and for the injury directly caused by it. If it be true that the plaintiff, by undertaking this railroad journey to Canada, thereby increased the injury and damage to the broken bones, and if he undertook that journey under such circumstances that he should not have done so in the exercise of due care, and it was a journey that he ought not to have undertaken, and the probabilities were that it would increase the danger, and in consequence of that trip he increased the injury he had received, then he would be guilty of contributory negligence, and for the damages thus occasioned the company would not be responsible. The burden of proof is upon the company to satisfy you, by a fair preponderance of the evidence, that that is what increased the damages,

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and that must be done by a fair preponderance of the evidence. You must be satisfied by a fair preponderance of the evidence that the damage was so increased, and if you are not, the plaintiff cannot be held responsible therefor, unless the damages are shown to be due to the negligence of the plaintiff himself. Now, in determining or passing upon this question of the negligence of the plaintiff, it is not sufficient to show that he undertook the journey, and there were some injurious results that happened, because it would be requiring too much of the plaintiff to hold him responsible just by reason of that fact; but other things must concur. That is to say, the plaintiff must have known, or by the exercise of ordinary care should have known, that it would be negligent for him to undertake the journey. If he knew that it would be negligent to do so, and yet determined to take the risk and run the chances himself, he ought to bear the result of his own negligence, and not the company. As I have already stated, you must be satisfied by a fair preponderance of the evidence that he so increased the damage, or else this instruction I am giving you has no weight in the case. You will therefore determine whether there was an increased injury as the result of said journey. Now it may have been imprudent to have undertaken the journey, and yet he may have undertaken and performed it, and no increased injury resulted; then that does not excuse the company. On the other hand, there might have been increased injury by reason of this journey, and it might have been undertaken under such circumstances that plaintiff was not chargeable with negligence in undertaking it.

The general rule, gentlemen of the jury, in regard to the measure of damages is this: If you find from the evidence that the plaintiff is entitled to damages, in the first place he is entitled to reasonable compensation for the pain and suffering he has undergone and endured, and still endures, in consequence of the injuries that are chargeable to the company,—the pain and suffering in the past, and the pain and

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suffering he is liable and likely to suffer in the future. Secondly, he is entitled to compensation for the loss of time that has been occasioned to him. If you find that he was detained here in St. Paul so many weeks, and was unable to prosecute his usual affairs, and it created a money loss to him, an actual pecuniary loss, he is entitled to compensation for that; he is entitled to fair compensation for the loss of his time. Then he is also entitled to compensation for the injuries to his health and bodily strength; in other words, if you find from the evidence in the case that this injury, for which you find the company is responsible, has affected his health, or affected his bodily strength in the past, then he is entitled to compensation therefor. And if you find that these are liable to continue in the future; if you find that the injury to his health and the injury to his bodily strength is to continue for any time,—he is entitled to compensation for that. This idea of injury to bodily health includes the effect it may have either in affecting his ordinary health, or his capacity and ability to labor. If, by reason of this negligence on part of defendant and the consequent damage, he is rendered less able to carry on any business or avocation that he might otherwise have been engaged in, that causes a pecuniary loss to him. You will take into account, therefore, the injury to his health as directly affecting the bodily strength of the plaintiff, and also as affecting his ability to labor, both in the past and in the future, provided you are satisfied from the evidence that this injury will continue any time in the future, and the plaintiff is entitled to pecuniary compensation therefor.

I do not think there are any other general elements of damage which you can take into consideration. Frequently there are actual expenditures that have been made for the services of physicians and attendance, and if the plaintiff had proved any such he would have been entitled to recover that also. But there is no evidence that any such expenditures have been made, and this plaintiff has produced no

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evidence upon this subject, so you cannot allow this matter, because there is no evidence to show that the plaintiff has suffered any loss in that regard, or has made any expenditures therefor. In a general way, as I have already stated, the elements of damage which you are to take into consideration will be the pain he suffered, the loss of time, the injury to his health and bodily strength, including in the latter the effect it may have had upon the plaintiff's ability to labor and carry on his business, both in the past and in the future.

Now, these are the elements you are to take into consideration, and you are to determine in this case the amount of injury that has been caused to the plaintiff by the fault of the company defendant.

As I said before, if you find that these damages have been increased or aggravated on account of or through the negligence of the physician, under the instructions I have given you, or by reason of the negligence of the plaintiff himself, the defendant in that case is not responsible for that increased injury. If you find that any portion of the damages to the plaintiff has been increased or aggravated by the negligence of the physician, or by the fault of the plaintiff himself, then the damages that have been shown to be occasioned to the plaintiff by the defendant in the first instance is all that the defendant would be responsible for.

You will determine in the first place the amount of injury that the defendant is held responsible for, and, having determined that, you will estimate in your judgment what would be a fair amount to compensate him for the injuries he has received through the negligence of the defendant. That is all you will take into consideration, and you will give this case your careful attention in the consideration of these matters. The amount of the damages is not to be increased or diminished by reason of the fact that the defendant is a corporation. This case must stand upon its merits, irrespective of the position of the parties, and the defend-

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ant should stand in no unfair position before you, but is entitled to justice the same as if it were an individual.

You will take the case and give it the consideration which the importance of the case deserves, and render such a verdict as the evidence warrants, using your own sound judgment in determining this matter between the parties.

The jury rendered a verdict of \$7,500 for the plaintiff, and the defendant moved to set aside the same on the ground that the damages were excessive.

KRESANOWSKI v. NORTHERN PAC. R. CO.

(District of Minnesota. October, 1883.)

1. **PERSONAL INJURY — CONTRIBUTORY NEGLIGENCE — VOLUNTARILY ASSUMING A POSITION OF DANGER.**— The plaintiff was employed by the defendant railroad company in excavating, and was sent with others to the place of work on an engine provided by the company for that purpose. The tender being full of wood, he, with one or two others, sat on the front of the engine, with his feet over the pilot. While proceeding to his work in that position, the engine on which he was riding ran into another engine, and the plaintiff received the injuries for which he seeks damages. On motion to the court to instruct the jury to find a verdict for the defendant, upon the ground, with others, that the evidence showed contributory negligence which would bar a recovery, the court, following the law as laid down by the supreme court in *Railroad Co. v. Jones*, 95 U. S. 439, held, (1) that the plaintiff himself so far contributed to his injury by his own negligence and want of ordinary care and caution in placing himself in such a dangerous position on the engine of the defendant, that he could not recover; and (2) that the plaintiff being of age, and able to see and know the risks of the position, even the fact that he had been invited and authorized by the defendant to ride upon the engine would not justify him in his negligence in placing himself in a position of apparent great risk and danger.

Action brought to recover damages under the following state of facts:

The plaintiff, who was employed in excavating by the de-

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fendant, was sent with others to his work on an engine. The tender being full of wood, he, with one or two others, sat on the front beam of the engine with his feet over the pilot. While proceeding to the work in that position, the engine on which he was riding ran into another engine, and the plaintiff was badly crushed in the collision, and one leg had to be amputated. The foreman of the gang was not present, and the engine was furnished by the company for the convenience of this gang of men, the distance to the work being from a mile and a half to three miles. At the conclusion of the plaintiff's case, defendant's counsel moved the court to instruct the jury to return a verdict in favor of the defendant, upon the ground that the plaintiff had failed to establish a cause of action against the defendant; and upon the ground that the evidence showed contributory negligence on the part of the plaintiff which would bar a recovery.

C. K. Davis, for plaintiff.

W. P. Clough, for defendant.

SHIRAS, *District Judge*.—I have considered, gentlemen, this motion that has been made asking the court to instruct the jury to find a verdict for the defendant, which has been presented and urged, mainly, on two ground: *First*, that the evidence of the plaintiff shows that the accident, and injury following it, were caused by the negligence of a co-employee; that the general rule is, where a person enters into the employment of a railroad company, that being a hazardous and perilous business, he undertakes all the ordinary risks that pertain to that business, and that among the risks which he thus takes upon himself are the dangers or risks from the negligence of a co-employee; and it is urged that the uncontradicted evidence shows that the accident in this case was due to the neglect of a co-employee,—that is, of a person who was engaged in the same common employment

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with the plaintiff; and that, as it was due to the negligence of a person standing in that position, under the general rule of law the plaintiff cannot recover. It is also urged that the evidence shows that the plaintiff, by his own action, placed himself in a dangerous position that contributed directly to the producing of this action; that is to say, that he got upon the pilot of this engine and rode there; that that was contributory negligence upon his part, and of such a character as to defeat his right of recovery in the case, under the evidence as it is now presented before the court.

I will present my views first upon the latter proposition in this case. It is the one that, to my mind, is the question that must be decisive of this motion. The supreme court of the United States has had this question before it in several different cases, and has laid down general rules that of course will control all inferior courts of the United States in determining when it is a proper case for the action of the court in giving a peremptory instruction to the jury to find for the defendant by reason of the fact that the plaintiff has failed to make out his case.

I think it is apparent to every one—it cannot be questioned—that a person placing himself upon the pilot of an engine certainly puts himself in a very dangerous position; there can be no more dangerous one to be thought of upon a train or upon a locomotive. It is apparent to every one that it is a place that is exposed to the very greatest danger. In case of any accident there is scarcely any protection at all to prevent the party from being thrown off from the locomotive; it is not a place that is gotten up or intended to be used for the purpose of persons riding upon, and in case of collision, where the collision comes from the front part of the engine, it is the place of all others that is exposed to the greatest danger. Now, I think it will strike the mind of any one that if a railway company should direct or require its employees to ride upon this pilot, it is requiring them to ride in an exceedingly dangerous place; but if the employee

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himself places himself in that position the same rule applies to him: he has himself placed himself where there is very great danger, and the query arises whether or not that is contributory negligence.

In the case of *Hough v. Ry Co.* 100 U. S. 213, that was cited in the argument yesterday in the discussion of this question, the supreme court say:

"If the engineer, after discovering or recognizing the defective condition of the cow-catcher or pilot, had continued to use the engine, without giving notice thereof to the proper officers of the company, he would undoubtedly have been guilty of such contributory negligence as to bar a recovery, so far as such defect was found to have been the efficient cause of the death. He would be held, in that case, to have himself risked the dangers which might result from the use of the engine in such defective condition."

Now, then, the evidence in this case shows that this locomotive was used for the purpose of transporting these employees and laboring men to and from the place at which they were engaged in their work. The employees knew that; they used it day after day, without complaint, so far as the evidence shows. There was no promise upon the part of the railroad company to supply them any different mode of transportation. They went upon this engine, and the evidence discloses the fact that they got upon the engine at different places; that is to say, they placed themselves upon different positions on this engine; and, among others, they placed themselves on the pilot, in front of the engine. The evidence does not show that that was done by the direction of any one in the employment of the company; that is to say, neither the engineer nor fireman, nor the boss in charge of the gang, ever directed that this should be done. It seems, as far as the evidence discloses the fact, to have been done by the men themselves; they chose to place themselves in that position. It is said, however, that one reason for it — and probably the reason that is assigned — is that the

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engine was so full of men that some of them, if they rode at all, were compelled to place themselves in that position, in front of the engine. Granting that position, we have this case: That here is the company furnishing this engine for the men to ride upon; the men go upon it, and continue doing so day after day, when it is apparent to them that if they all ride upon that engine some of them must ride upon that pilot, and they choose to do so, and they place themselves in that position. Now, then, they know the risks. It seems to me, within the rule of this case of *Hough* against the Railroad Company, they concluded to use the engine for the purpose of being transported upon it, after they had knowledge of the fact that if they did so that they would be placing themselves in a dangerous position. They must have known that fact.

In the case of *Railroad Co. v. Jones*, 95 U. S. 439 (a case somewhat similar in features to the case now before the court), the supreme court laid down some rules which seem to me to be applicable to this case. In this case — the case of *Railroad Co. v. Jones* — the facts were that the person who was hurt was riding, with one other, upon the pilot of the engine. The accident was caused by collision with some cars that were standing upon the track; and this locomotive came in collision with these cars, and the plaintiff was injured thereby. Now, it appears that this plaintiff was engaged in the service of the company as a day-laborer. "He was one of the party of men employed in constructing and keeping in repair the roadway of the defendant. It was usual for the defendant to convey them to and from their place of work. Sometimes a car was used for this purpose; at others, only a locomotive and tender were provided. It was common, whether a car was provided or not, for some of the men to ride on the pilot or bumper in front of the locomotive. This was done with the approval of Van Ness, who was in charge of the laborers when at work, and the conductor of the train which carried them both

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ways. The plaintiff had no connection with the train. On the twelfth of November before mentioned the party of laborers including the plaintiff, under the direction of Van Ness, were employed on the west side of the eastern branch of the Potomac, near where the defendant's road crosses the stream, in filling flat cars with dirt and unloading them at an adjacent point. The train that evening consisted of a locomotive, tender and box car. When the party was about to leave on their return that evening, the plaintiff was told by Van Ness to jump on anywhere; that they were behind time and must hurry. The plaintiff was riding on the pilot of the locomotive, and, while there, the train ran into certain cars belonging to the defendant, and loaded with ties." That is the evidence as given by the plaintiff. Of course, upon the ruling here, the court must have viewed the evidence in the aspect that was most favorable to the plaintiff. On the part of the defendant there was evidence tending to show that Van Ness had, on several occasions before the accident, notified the laborers that they must ride in the car, and not on the engine; and the plaintiff in particular, on several occasions not long before the disaster, was forbidden to ride on the pilot, both by Van Ness and the engineer in charge of the locomotive. "The plaintiff, in rebuttal, gave evidence tending to show that sometimes the box car was locked, when there was no other car attached to the train, and that the men were allowed by the conductor and engineer to ride on the engine, and that, on the evening of the accident, the engineer in charge of the locomotive knew that the plaintiff was on the pilot." The court ruled:

"One who by his negligence has brought an injury upon himself cannot recover damages for it. Such is the rule of the civil and of the common law. A plaintiff in such cases is entitled to no relief. But where the defendant has been guilty of negligence, also, in the same connection, the result depends upon the facts. The question in such cases is: (1) Whether the damage was occasioned entirely by the

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negligence or improper conduct of the defendant; or (2) whether the plaintiff himself so far contributed to the misfortune by his own negligence, or want of ordinary care and caution, that, but for such negligence or want of care and caution on his part, the misfortune would not have happened. In the former case the plaintiff is entitled to recover. In the latter case he is not. It remains to apply these tests to the case before us."

The court then proceeded to say, after a brief discussion of the evidence:

"For the purposes of this case we assume that the defendant was guilty of negligence.

"The plaintiff had been warned against riding on the pilot and forbidden to do so. It was next to the cow-catcher, and obviously a place of peril, especially in case of collision. There was room for him in the box car. He should have taken his place there. He could have gone into the box car in as little, if not less, time than it took to climb the pilot. The knowledge, assent or direction of the company's agents as to what he did is immaterial. If told to get on anywhere—that the train was late and that he must hurry,—this was no justification for taking such a risk. As well might he have obeyed the suggestion to ride on the cow-catcher, or put himself on the track before the advancing wheels of the locomotive. The company, though bound to a high degree of care, did not insure his safety. He was not an infant, nor *non compos*. The liability of the company was conditioned upon the exercise of reasonable and proper care and caution on his part. Without the latter the former could not arise. He and another who rode beside him were the only persons hurt upon the train. All those in the box car, where he should have been, were uninjured. He would have escaped also if he had been there. His injury was due to his own recklessness and folly. He was himself the author of his misfortune. This is shown with as near an approach to a demonstration as anything short of

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mathematics will permit. The case is thus clearly brought within the second of the predicates of mutual negligence we have laid down."

Now, the court there hold that it would make no difference in the ruling if it should be shown that the plaintiff had occupied this position upon the pilot with the knowledge or assent, or even by the direction of the company's agents. They hold that as immaterial; that those things would be no justification for his taking the risk; that he was not an infant,—in other words, he was of age,—he could see and know the risk as well as any other person, and if, under those circumstances, he chose to place himself in that position, then he must be held to have assumed the risks which would pertain to the position that he himself placed himself in, even if he did it by the direction of the company. That is the meaning of this decision. They hold, if I understand it, that if the agents of the company, the boss Van Ness or the conductor, had told him to get on that pilot, and he had done so and the accident happened, and he had gone there voluntarily, knowing the risk and danger, that he must be held to assume all the risk and danger caused by his placing himself in that position.

The evidence in the case now before the court, just as in this case of *Railroad Co. v. Jones*, shows that if the plaintiff had not been on the pilot he would not have received any injury,—or, at least, none to speak of; certainly these injuries, of which he is now complaining, would not have been occasioned to him. Just as the court say in the case of *Railroad Co. v. Jones*: "This is shown with as near an approach to a demonstration as anything short of mathematics will permit," that if he had been at another place than where he was he would not have been hurt, because there were a large number of men besides himself upon that engine, and no other one received any injury, except, perhaps, one person, who was struck in the face by some wood that was thrown from the tender. It comes down, therefore,

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simply to the inquiry of whether or no plaintiff is to be held responsible for having placed himself in this dangerous position that he occupied. I think there can be no question about it. There certainly can be no doubt, upon that decision, that where a man voluntarily places himself on the pilot of a locomotive, it must be held by every one that he is riding in an exceedingly dangerous place, and that it is folly for a man to do it; that it is recklessness; and if injury results it seems to me he must be held to assume the risk for it.

I have hesitated in this case, by reason of the fact that the point might be made to the jury, and they asked to find from this evidence, that the party was justified in going where he did, and the company could take no exception thereto, because the engine was not sufficient, under one view of the evidence, to afford room for these men all to ride upon it unless some of them got upon the pilot, and therefore, by reason of that fact, it must be held that the company invited him and authorized him to go there; but the difficulty with that position is that, as I understand this decision in *Railroad Co. v. Jones*, the supreme court of the United States expressly say that if he had gone there by the direction of the company, it would not make any difference,—he still assumed the risk. Now, all the jury could be asked to infer in this case would be that the company authorized him to go there by reason of the fact that they did not have sufficient accommodation for the men to ride any other place, and, as there was not room enough for all of them to go on the tank, that the company intended them to ride on the pilot, or directed them to go there; but, as I say, it seems to me that the supreme court have met that very position by saying that that is immaterial; that even if the agents of the company did say, "You go here; it is a dangerous place," yet the danger is open to the observation of every one, so that the party when he is invited to go there must be held to know the risks, and then if he chooses to

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go there he assumes the risks himself. That rule must not be unduly extended. There are many cases when a party might be invited to go where he himself does not know the risk,—the real dangers are not so open to his observation as to the observation of the company; and in that case there may be an exception. But each case must stand upon its own facts. Here, the accident arose, not from any hidden defect—the danger was apparent; the plaintiff chose to ride in the most dangerous place on the locomotive, and which was open to the observation of every one. It seems to me, under the doctrine of this case, and also the doctrine of this extract from the case of *Hough v. R'y Co.*, that it must be held that the party assumed all the risk that naturally followed from his riding in this dangerous place; and the evidence is clear in the case that by reason of the fact that he was on that pilot he received the injury complained of. As to that there can be no question.

If I am right in this view of the case, it would follow that the duty is imposed upon me, as is said in this case of *Railroad Co. v. Jones*, that, upon being so prayed, it is the duty of the court to direct the jury to return a verdict for the defendant, and that if I refused to do so it would be error. If I am correct in that view, it is unnecessary for me to pass upon the other question that has been discussed at considerable length, as to whether or not the plaintiff is a co-employee under the general rule of law, and whether or not, where the injury results from the negligence of a co-employee, it is one of the ordinary risks which the party assumes when he enters into the employ of the railroad company.

I must say it is with considerable regret that I am forced to the conclusion to which I have come in this case. The facts present a case which certainly must appeal very strongly to the sympathies of every one, and to the sympathies of those who are engaged in the management of this railroad company, that they should, without reference

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to the question of the legal liability,—whether there is any legal liability or not,—endeavor, as far as lies within their power reasonably, to aid parties who receive injuries when they are in the employ of the company. My duty, of course, is simply to enforce the law as I find it laid down by higher tribunals, whose decisions I must follow.

Entertaining the view I do of this case, gentlemen, I am compelled to grant the motion of the counsel for the defendant.

MACKOY v. MISSOURI PAC. R'Y CO.

(Eastern District of Missouri. October, 1883.)

1. **COMMON CARRIER—NEGLIGENCE—DUTY OF PASSENGER.**—A railway passenger is bound to exercise ordinary care and prudence to preserve himself from injury.
2. **SAME.**—A common carrier of passengers is bound to exercise the highest degree of care and skill which a cautious or prudent man would exercise under the circumstances.
3. **SAME.**—If it fails to exercise that degree of care and skill, and a physical injury results to a passenger, without the latter contributing materially or substantially thereto by negligence on his part, the carrier is liable in damages.
4. **SAME—MEASURE OF DAMAGES.**—In such cases the injured party is entitled to an amount which will compensate him for the injuries sustained, and the expenditures he has had to make and the liabilities he has incurred in consequence of the injury, and for the pain and suffering he has undergone, taking into consideration the permanent or temporary character of the injuries.
5. **SAME—DAMAGES—EVIDENCE—PRACTICE.**—Where evidence was admitted concerning the plaintiff's dependence for his support upon his labor, but the court, in laying down the rules as to the elements of damages, in its charge to the jury omitted the dependence of the plaintiff upon his personal labor for his support, *held*, that the error, if any, in admitting such evidence was cured by the charge.

Motion for a new trial.

This is a suit to recover damages sustained through the alleged negligence of the defendant in coupling the car, in

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which it was transporting plaintiff, to another. It is alleged that the cars were brought together with such violence as to throw the plaintiff, who was standing up at the time, down upon the floor, and injure him seriously. The case was tried before a jury. During the trial the plaintiff testified, on his own behalf, as follows:

Question. I will get you to state what your condition is; whether you are a man of much or little means. *Answer.* Oh, my means are limited; I am poor.

Judge Pike. We object to that as immaterial.

Judge Treat (to the witness). Are you dependent on your labor for your subsistence? *Answer.* Yes, sir; mainly so. At the time of the accident I had a farm, but I have sold it, and have expended nearly all the money in costs and expenses to live upon.

The court charged the jury as follows:

TREAT, *District Judge (orally).*—The rule of damages in cases of this character is what in law is called compensatory. That, as you understand, is contradistinguished from vindictive or exemplary damages. Thus, if you find for the plaintiff in this case, you will have to assess the amount of his damages at such a sum as in your judgment, under the facts and circumstances developed, would compensate for the injuries sustained, and for the expenditures he has had to make, and liabilities incurred in consequence of the injury, and also for the pain and suffering he has undergone, bearing in mind the consideration whether the injuries are likely to be permanent or temporary.

As to the liability of the company, the rule of law is this: That a common carrier, a railroad, is bound to exercise the highest degree of care and skill which a cautious or prudent man would exercise under the circumstances. If it fails to exercise that degree of care and skill, and an injury results therefrom without the party who is injured contributing materially or substantially thereto, then the road must

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respond in damages. It is also, on the other hand, the duty of a passenger in a train to exercise that ordinary care and prudence which a prudent man would himself observe to save himself from injury. The degree of care on the part of the railroad company is the highest degree of care and skill; the degree of care on the part of the passengers is ordinary care and skill. Hence, in these cases, it becomes the duty of the jury to look at all the facts and circumstances surrounding the matter, to ascertain — *First*, whether the railroad was guilty of negligence; *secondly*, whether, if it was guilty of negligence, the passenger injured did himself substantially or directly contribute thereto; because if he did contribute thereto the law does not divide between the respective parties the amount which has been caused — the amount, I mean, in money or damages caused thereby. There is no rule by which such a division could be had. Therefore, the law states distinctly that if a party has himself contributed substantially or directly to the injury, then there can be no recovery on his part.

Now, you have heard the testimony here, and there is no rule of law that gives, or can give to you, any specific direction with regard to the facts and circumstances disclosed. It is a case which belongs peculiarly to the jury for their consideration. In other words, you have heard the testimony of these witnesses, discrepant in some parts. It is for you to weigh the testimony and determine the degree of credibility that you will attach to the testimony of the one or the other witness whose evidence has been given, and in doing so it is always important to consider whether the particular witness testifying was in a position to ascertain accurately, under the circumstances, precisely what occurred or not; also whether the party testifying has any special interest in the controversy, one way or the other.

Now, there is no rule of law that the court can give you with respect to the position which a passenger should occupy under given circumstances in a railroad car, except that he

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should exercise that degree of care and skill for his own safety which an ordinary and prudent man would exercise. On the other hand, in the light of common experience, where trains are being coupled a party is supposed to understand what is likely to occur, which would bring you to the inquiry here, more especially, whether the coupling of these cars was under such circumstances as to cause an injury to a man of ordinary prudence. If so, then it was an act of negligence on the part of the defendant.

I do not know that the court can give you any other rules, gentlemen, in regard to the matter. It will leave the case to your judgment rather than the court's direction.

The jury found a verdict for the plaintiff, and assessed his damages at \$4,500.

The defendant thereupon moved for a new trial. The remaining facts sufficiently appear from the opinion of the court.

Andrews & Pike, for defendant.

Dyer, Lee & Ellis, for plaintiff.

TREAT, *District Judge*.—The only substantial question presented by the motion for a new trial is as to the admission of evidence concerning plaintiff's dependence for his support on his own labor.

The doctrine as to this class of evidence is fully stated in *Pennsylvania Co. v. Roy*, 102 U. S. 451. In that case the error alleged was directly cured by the charge of the court; but in the case now under consideration, the error, if any, was only impliedly cured through the rules laid down as to the elements for damages, which omitted the dependence of plaintiff on his personal labor for subsistence.

While compensatory damages are not dependent on the poverty or wealth of a person wrongfully injured, yet is it not proper for the jury to know that the physical injuries sustained are not only permanent in their character, but of

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such a nature as to deprive the injured party of his only means of support? True, the railroad is not supposed to discriminate, nor does the law, as to compensation for injuries with respect to the financial condition of a passenger. Every passenger contracts on equal terms, and the obligations as to each are the same. But is it to be contended that what would be just compensation in one case should obtain in all cases, irrespective of the injured party's dependence on the use of his impaired physical means for support? The rules laid down in the case cited seem to go the length for which defendant contends, yet, when they are considered under the facts and circumstances then before the supreme court and those now under review, they fall far short of establishing error in the rulings as to admission of evidence, especially when the charge of the court is considered. On the objection of defendant's counsel, the court, without formally ruling upon the evidence introduced and sought to be introduced, did informally limit that line of inquiry to the simple subject embraced in its question, thereby excluding all other evidence in that direction. The question, then, is, whether the evidence elicited in answer to the court's inquiry constitutes a fatal error, not cured by the charge as given. To that question the court responds in the negative, and overrules the motion for a new trial.

THOMPSON, Adm'r, etc., v. CHICAGO, M. & ST. P. R'Y Co.

(*District of Minnesota. October, 1883.*)

1. NEGLIGENCE OF CO-EMPLOYEES.—The engineer in charge of a steam-shovel and a workman engaged with the said machine are co-employees, and if the latter is injured by reason of negligence or want of prudence on the part of the former, there can be no recovery.
2. SAME — KNOWLEDGE OF SUPERIOR OFFICER.—Where it is claimed that an employee is injured by negligence or carelessness on the part

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of his superior officer, it must be shown affirmatively that the superior was in possession, or might by the exercise of ordinary care, prudence or intelligence have been in possession, of knowledge as to the dangerous character of the work, which knowledge was unknown, and by the exercise of ordinary care, prudence and intelligence on the part of the employee could not have been known, to said employee.

At law.

SHIRAS, *District Judge (charging jury)*.—In this cause the plaintiff, as administrator of the estate of Christel Olsen, seeks to recover damages in the sum of \$4,995 against the defendant, the Chicago, Milwaukee & St. Paul Railway Company, on the ground that said Olsen, while in the employ of the company, was killed by the falling of a bank of earth upon him, on or about the twenty-fourth day of July, 1881.

It appears from the admission in the pleadings, and from the undisputed evidence in the case, that Christel Olsen had been, for some time prior to his death, in the employ of this railroad company as a section hand upon that part of its road running through Fillmore county, in this state; that in July, 1881, he, with others, was taken from the ordinary section work, and formed into a gang and put to work at a point upon the road known as Ryan's cut; that their work consisted in cutting out and loading upon cars earth and materials used in filling up other portions of the defendant's track, the same being dug out by means of a steam-shovel, which was operated both day and night,—the said Olsen forming part of the force that operated the shovel during the night-time; that Olsen, with an assistant, was placed between the steam-shovel and the bank of earth, by the side of the shovel machine, which was placed about eight feet from the bank; that the work of excavating the bank for filling purposes was under the general supervision of one Thomas Kavanaugh, who was a road-master in charge of some fifty miles of defendant's road, including the point known as Ryan's cut;

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that the work of excavating this bank or cut had been in progress for some time, and the cut had been carried a distance of some five hundred or six hundred feet, its height varying from six to eighteen or twenty feet; that early in the morning of July 24, 1881, while the said Olsen was in his proper position by the side of the steam-shovel, the bank fell upon him, causing his immediate death; that Thomas Thompson, the plaintiff herein, has been duly appointed administrator of the estate of the deceased, and in that capacity is entitled, under the laws of the state of Minnesota, to maintain an action for damages caused by the death of said Olsen, against any party legally responsible for the death of said Olsen, if any such there be.

The plaintiff in this action claims that defendant is legally responsible for the damages caused by the death of said Olsen, and as grounds for such claim avers, in substance, that the bank at the place where the steam-shovel was being operated on the night of the twenty-third and morning of the twenty-fourth day of July, 1881, was composed of earth, clay, sand or gravel, and was, from its composition, liable to cave in and fall down; that Kavanaugh, the road-master of defendant, knew by personal inspection the unsafe and dangerous character of the bank, and its liability to cave in or fall down, unless it was sloped or otherwise protected; that, without taking proper precaution for the safety of the men under him, he required them to carry on this work; that he placed Olsen between the bank and the steam-shovel, and did not warn him of the danger to which he was exposed; that Olsen was ignorant of the danger, not being acquainted with the character of the bank; that by the mode in which the work was carried on under the direction of Kavanaugh the bank was caused to fall, thereby causing the death of said Olsen. These allegations are denied by the defendant, who claims that the falling of the earth was an unforeseen accident, and was not caused by any negligence on the part of said Kavanaugh, and that Kavanaugh did not

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know, or have reason to suspect, that there was any special risk or danger of the bank caving in, and that he had no more knowledge in regard to the bank, its composition, and liability to cave in and fall down, than had Olsen himself.

In cases of this character it is not sufficient, to enable the plaintiff to recover, for him simply to show that his intestate, while in the employ of the company, was killed by some accident happening in connection with the business of the company. Plaintiff, upon whom the burden of proof rests, must show further that the accident causing the death of his intestate was itself caused by, or resulted from, some negligence on the part of the railroad company, or on the part of some of its employees acting for the company; and that, while so acting, they do not occupy the position of co-employees engaged in the same common enterprise with the intestate. The business of railroading, in all its branches, is a more or less hazardous vocation, and those who engage in the same are held to have assumed the peril and hazards which ordinarily pertain to the business when properly carried on by the company. In this case, therefore, it is not sufficient, to enable plaintiff to recover in this action, for him to simply show that his intestate, Olsen, was killed by the caving in or falling down of a bank of earth upon him while he was engaged in excavating the same for the benefit and under the direction of the defendant.

The plaintiff bases his right to recover upon the principle that if there is about the employment a danger or risk which is known to the employer, or in the exercise of ordinary care would be known to him, and is not known to the employee, then it is the duty of the employer to notify the employee of such risk, and if he fails to do so, and the employee is injured, then the latter may recover. To enable the plaintiff to recover he must satisfy you by a fair preponderance of the evidence that previous to the happening of the accident in question the said Thomas Kavanaugh, the road-master of the defendant, knew, or by the exercise of ordi-

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nary care might have known, the dangerous character of the bank that was being excavated, and that, if the work of excavating the same was carried on in the manner in which he directed it to be done, there was danger of its falling down; and that, having such knowledge or means of knowledge, he failed to notify Olsen of such danger, and that Olsen, on his part, was ignorant of such danger.

What then, gentlemen, do you find the fact to be upon this issue? Does or does not the evidence fairly satisfy you that when Kavanaugh was at Ryan's cut, just previous to the accident, he then knew, or in the exercise of ordinary care and prudence should have known, that if the work of excavation was carried on as by him directed it would increase the liability to cave or fall down to a dangerous extent, so that, in the exercise of ordinary care and prudence, he should have notified the workmen of such danger. Did or did not Olsen have the same knowledge or means of knowledge of the condition of the bank and the risk of its falling as did Kavanaugh?

In determining these questions, gentlemen, you must bear in mind that you are to consider them in the light of the knowledge which the parties had before the accident happened. The true question is, how did the bank and excavation appear, and what evidences of danger were there fairly within the reach of the parties, before the accident happened. If then, gentlemen, you find, under the evidence, that Kavanaugh, when directing the prosecution of the work, during the night of the accident, knew, or in the exercise of ordinary care and prudence should have known, that the further prosecution thereof, in the manner he directed the same to be done, would subject the workmen to unusual or increased risks, of which they were ignorant, then it was his duty to have notified the workmen of such increased danger; and if he did not do so, and the workmen, in ignorance of the increased risk, continued the work of excavating the bank, and the same caved or fell down, and

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injured or killed any of the workmen, the company would be liable for the injury they caused. If, however, the workmen knew the increased risk or danger, or had the same means of knowledge regarding the same that Kavanaugh had, so that, by the exercise of ordinary care on their part, they would have had equal knowledge with Kavanaugh of the risk and danger, and they chose to continue in the work, then they are deemed to have themselves assumed the risk, in which event the company would not be liable.

Then, restating the proposition more briefly, you are to determine: *First*, whether Kavanaugh, when directing the carrying on of the work at Ryan's cut, just before the accident happened, knew, or in the exercise of ordinary care should have known, that to continue the work of excavating in the manner he directed it to be done would render the position of Olsen hazardous to a degree beyond that which Olsen had a right to expect from its appearance and from the knowledge he had of its probable character; *second*, whether Olsen knew, or in the exercise of ordinary care on his part should have known, that this increased danger, if any there was, existed. If you find that Kavanaugh did not know, or in the exercise of ordinary care might not have known, the existence of any unusual or increased danger in continuing the work, then the defendant is not liable, and the verdict must be for the defendant. If, however, you find that Kavanaugh knew, or in the exercise of ordinary care should have known, of the increased danger to the workmen, then your verdict should be for the plaintiff, unless you find that Olsen knew, or in the exercise of ordinary care on his part should have known, the existence of this increased danger. If he did know, or in the exercise of ordinary care should have known, the increased risk or danger, and he continued to work in the position he was placed in, then he is held to have assumed the risk himself, and in such case the plaintiff cannot recover, and your verdict must be for the defendant. In determining the questions of the

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knowledge or means of knowledge which Kavanaugh, on the one hand, and Olsen, on the other hand, had of the bank, its composition and liability to cave or fall down, you are to take into account the knowledge or experience which these parties respectively had of such banks and of the work of excavating the same, especially with the steam-shovel, as well as what they knew of this special bank.

From the foregoing instructions you will perceive, gentlemen, that to enable plaintiff to recover he must satisfy you, by a fair preponderance of the evidence, that Kavanaugh knew, or in the exercise of ordinary care should have known, that there existed a peculiar or unusual danger in prosecuting the work of excavating, which danger was not communicated to Olsen, and of which, without fault on his part, he, Olsen, was ignorant. If you find the fact to be that Kavanaugh, without fault on his part, was ignorant of the danger when last at Ryan's cut, and that after he left the place where the work was being done the men in charge of the steam-shovel caused the bank to fall by digging more deeply than was prudent, then this negligence would be the negligence of co-employees, the risk of which was assumed by Olsen, and for which the defendant is not liable. So, also, if it appears that the bank fell down, not by reason of the want of due care on the part of any one connected with the work, but by reason of some unforeseen change in its composition, or other like fact, the defendant could not be held liable for injuries caused thereby. In such case the falling of the bank would be a pure accident, and no one would be responsible therefor.

In other words, to entitle the plaintiff to a verdict, you must be satisfied that Kavanaugh knew, or in the exercise of ordinary care should have known, that Olsen was about to be exposed to an unusual and extraordinary danger, the existence of which was not communicated to him, and that Olsen did not know, and was not in fault in not knowing, of the existence of this extraordinary danger, but in ignorance

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thereof, and in obedience to the orders of his superior, subjected himself to this increased danger, and in consequence thereof met with the accident which caused his death. If, under the instructions given you, and the evidence submitted to you, you find for the plaintiff, you will then be required to assess the amount of damages to which the plaintiff may be entitled. The general rule by which you are to be governed is the amount of pecuniary loss caused to the estate of Olsen by his death. In determining this amount, you will take into account his age at the date of his death, the condition of his health, and his ability to labor; the probable duration of his life; the amount of his probable earnings; and from these *data* you will determine the sum to which plaintiff may be entitled. You will remember that the sum you award is given in a lump, and is, therefore, freed from the uncertainties that pertain to the ordinary affairs of life, and should be such reasonable sum as the evidence justifies you in awarding, uninfluenced by the fact that the defendant is a corporation.

C. K. Davis and Colburn & Bassett, for plaintiff.

Bigelow, Flandreau & Squires, for defendant.

HOLLAND v. CHICAGO, M. & ST. P. R. CO.

(*District of Minnesota. June, 1883.*)

1. **PERSONAL INJURY — CONTRIBUTORY NEGLIGENCE.**— Plaintiff, intending to cross the railroad where there were three or four tracks, looked east and west for approaching trains, and saw a freight train coming from the west on the second track; waited for that to pass, and immediately thereafter crossed onto the next track, and on stepping thereon was run over by a passenger train coming from the east, and was injured. The view to the east was uninterrupted for one thousand five hundred to one thousand six hundred feet, and if the plaintiff had looked to the east after the freight train had passed

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he must have seen the passenger train. No whistle was sounded nor bell rung, nor other signals given. *Held*, that though no signals were given, the plaintiff was guilty of such contributory negligence that his right to recover would be thereby defeated. Following *Railroad Co. v. Houston*, 95 U. S. 697, and *Schofield v. Railroad Co.* 2 McCrary, 268 (S. C. 8 Fed. Rep. 488).

2. **SAME — PROTECTION OF EMPLOYEE BY EMPLOYER.**— While it is true that an employee, while working in a dangerous place, where he is required to give his attention to the work in hand, is entitled to rely on the fact that the employer, knowing such to be the fact, will exercise due care and diligence to protect his employee from danger not directly arising from said work, yet this rule will not apply in the case of an employee who, walking across a track to get his tools, is run over by an approaching train, for the reason that, the act of walking being automatic, it is not such an act as would engross a man's attention to such an extent that with ordinary care and diligence he would not see or hear an approaching train. Construing *Goodfellow v. Railroad Co.* 106 Mass. 461.

At law.

The case is fully set out in the opinion of the court. At the conclusion of plaintiff's testimony the defendant moved the court to instruct the jury to find a verdict for the defendant, on the ground that the plaintiff, on his own showing, contributed to the injury by his own negligence, and therefore cannot recover. Plaintiff's counsel urged that he was entitled to recover on three grounds:

First. That defendant was obliged to keep his premises in a proper and safe condition, so as not to expose his employees to any unusual or unexpected danger which might have been guarded against by proper diligence on his part; citing *Hough v. Railroad Co.* 100 U. S. 213; *Wabash R'y Co. v. McDaniels*, 11 Amer. & Eng. R'y Cas.; *Buzzell v. Laconia Manuf'g Co.* 48 Me. 116; *Dick v. Railroad Co.* (Ohio) 8 Amer. & Eng. R'y Cas. 101.

Second. That where an employee's attention is occupied by the work he is engaged in, he is entitled to rely upon the employer using diligence and care to protect him while thus engaged, and that the plaintiff's attention was drawn to the necessity of reaching the tool-chest where the tools were

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with which he was to work for the defendant, and that the defendant, having failed to give signals or warning of the approaching passenger train, was derelict in its duty to this plaintiff, and plaintiff is entitled to recover therefor; citing *Goodfellow v. Railroad Co.* 106 Mass. 461; *Snow v. Railroad Co.* 8 Allen, 441.

Third. That if any care or diligence in looking out for the approaching train and guarding against accident is shown to have been used by plaintiff, the question of the sufficiency of the care and diligence is a question for the jury, and not one for the court to pass upon, and therefore, it having been shown that the plaintiff did look up and down the track before the freight train passed, the same was an act of care and diligence on his part; and the defendant having been guilty of negligence in not giving any signals or warning of the approaching train, the whole question of diligence or negligence should be submitted to the jury; citing *Johnson v. Bruner*, 61 Pa. 58; *Kellogg v. Railroad Co.* 79 N. Y. 72; *Chaffee v. Railroad Co.* 104 Mass. 108.

S. L. Pierce, for plaintiff.

Bigelow, Flandreau & Squires, for defendant.

SHIRAS, *District Judge*.—Since the adjournment of the court last night I have considered the motion made in this case of *Holland v. Chicago, Milwaukee & St. Paul Railway Company*. The motion was made at the close of the plaintiff's testimony that the court instruct the jury that, under the evidence as submitted by the plaintiff, he has failed to make out a case, and therefore it is their duty to return a verdict for the defendant. The testimony in this case presents no dispute as to the question of facts; the case really turns upon the testimony of the plaintiff given directly by himself. With regard to the witnesses the case shows no disagreement among them as to the facts, and as to the facts as shown by the plaintiff's own testimony, with regard to

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which there is no dispute. Now, of course, the general rule applies to this case, that the plaintiff to recover must show fault or negligence on the part of the defendant causing the injury complained of, and that would not enable him to recover if it appears from the testimony that the plaintiff himself has been guilty of contributory negligence which would defeat his cause of action. The rule of law, being briefly stated, is that where the evidence shows that both parties are in fault there can be no recovery for the plaintiff.

It is clearly in testimony that Holland, this plaintiff, was in the employ of the railroad company as a laborer, engaged in the excavation of a certain part of the defendant's road known as the short line; that the tools which were used in this excavation were kept on one side of the track in a tool-chest, and it is conceded it was a proper place or site for said tool-chest, which was provided for that work upon the bank. It seems that the place where this tool-chest lay was on the opposite side of the bank from where the excavation was being done, and across the railroad track, and at that place there were three or four tracks; as to the number, whether three or four, the evidence leaves in doubt. The plaintiff came down to his work in the morning, and when he came there, in order to reach the tool-chest, he had to cross these tracks. He went that way across the tracks the first day to obtain his tools, and the second morning he came down the same way to go to his work, where, as far as the evidence shows, he had a perfect right to cross. He went there in order to go to the place where the tools were to do the work which he had engaged with the railroad company to do. His testimony shows that as he came down that morning he discovered upon the first track,—a side track, or whatever it may be termed,—it was the one nearest the embankment,—that there were some empty flat cars that were being pulled out of the way, or had just gone out of the way, so that he could get past the track without difficulty. Then, upon the next track, when he came to that,

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he looked up and down the track for the purpose of seeing whether there was anything in the way to prevent his crossing, and coming in one direction he saw a freight train that was coming down on that second track. The evidence shows that from where he was he could see down the track towards the city a distance of one thousand five hundred or one thousand six hundred feet, provided there was nothing in the way, and no cars to interrupt his sight. As far as the topography of the ground and the location of the track were concerned, he could see that distance. He came down to the track, and looked up and down, and saw this freight train coming down on the second track, and, using his judgment and calculation, he determined not to pass over the track until the freight train passed, and therefore waited for the freight train to go by, so that he could pass by it. He states it took about a couple of minutes, or some such time as that, for the freight train to pass by, so that he could pass over that track. After the freight train had gone by on that track, he then passed immediately in the rear of that train, which brought him to the third track, which was the one where the passenger train was, and where the accident occurred. His testimony shows that when he came to that, and when he passed over the second track, he felt so confident that there was no danger of anything to interfere with his doing so, that he walked straight forward onto the main track, and, in doing so, walked right in front of the train of cars, and was injured.

In regard to all these facts there is no dispute, and there are no conclusions to be drawn from them, so far as the facts are concerned. The supreme court of the United States, in the decision in 95 U. S. 697 (*Railroad Co. v. Houston*), which was referred to by counsel in the argument, gives the rule to be observed, which is also fully set forth in the opinion of Judge McCrary in *Schofield v. C., M. & St. P. Ry Co.* 2 McCrary, 268 (S. C. 8 Fed. Rep. 488). Supposing the evidence, just as it stood, were submitted to

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the jury, and the jury should find affirmatively for the plaintiff,—find, for instance, that the plaintiff had not been guilty of contributory negligence,—could the court, upon a motion for a new trial, let the verdict stand as justified by the facts, and as a finding upon the question of fact? If the case should not go to the jury, it is the duty of the court, in a case of this kind, to take the case away from the jury by giving them the instruction that is asked in this case; bearing in mind that the real question is whether the evidence would sustain a finding by the jury that the injury complained of was caused by the negligence of defendant, and upon the issue of contributory negligence that the plaintiff, in doing what he did do, exercised the care required of him in the situation in which he was placed.

A very ingenious argument has been made by counsel for plaintiff, based upon a line of authorities produced before the court, to show that, under the circumstances, the plaintiff had a right to do what he did, upon the theory that, in the first place, he had a right to rely upon the fact that the company itself would do whatever was proper for this company to do for his protection, in giving signals, or whistling, or warning him by ringing a bell, or anything that it should have done to protect its employees; that he had a right to rely upon it that the company would do all that care and prudence upon its part would require to be done; and that the court must hold that under the evidence the company did not do what was required of them, because there was no signal or warning given to the employees of the coming of the train.

Argument is also made, based upon a line of authorities cited, that where the employee is, by reason of his employment, placed in a dangerous position, and he is required to devote his time and attention to the work that he is engaged in doing, that that will excuse him from being as alert as he otherwise would be to the danger of his position. The rule laid down in the authorities cited is to be applied when the

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facts of the case require it, and this arises ordinarily in cases in which the employee is required, by the very work he is to do, either to be upon the track or in some such place of danger. Many cases arise where employees are required to go upon or under cars to make repairs on the cars while on the track. It is plain that where the railroad company requires an employee to go under a car to repair it, the duty devolves upon the company to see that no other car is sent down upon that car, so as to move the car upon which the employee is at work. Or in case an employee is sent to work in a place where danger lies, while he is performing such work he has a right to rely upon the company exercising due care to protect him in his work.

In the *Derrick Case*, 106 Mass. 461 (*Goodfellow v. Railroad Co.*), cited by plaintiff's counsel, where the employees were required to be on the track and hold a rope attached to a derrick, it was necessary, for the safety and protection of others, that the men who had hold of the rope should give their attention to that matter. When they were placed in that position, and the railroad company knew that fact, there was a duty laid upon the railroad company to see that no injury happened to them; and in all these cases, extreme as they are, the rule is still recognized by the courts that the employee is not relieved from exercising the care which he should exercise, considering the work in which he is engaged. In other words, if there is recklessness and carelessness on the part of the employee, it will still defeat his right of recovery.

Now, in this case, the undisputed evidence, as I said before, shows that the man was not engaged in any work that required his attention. He was simply walking across the track, and if there is anything that becomes automatic, it is the act of walking or going from one place to another. We do not direct our attention to the act of lifting one foot and then putting it down; it is done without the exercise of thought on our part, and is necessarily an automatic action.

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It was not necessary for him to give much attention to it, aside from the fact of where he was walking. When he walked he walked automatically. A man, when he is walking, can give his attention to what is taking place about him. It is a very different state of facts from where a man is required to do a mechanical piece of work, and where he cannot do it properly unless he devotes his time and attention to that piece of work. In this case, therefore, the query is, whether the jury would be justified, under the state of facts as narrated by the plaintiff and his witnesses, in saying that where a person is coming down for the purpose of crossing a railroad track, or an employee is coming down for that purpose, where are several tracks, and he finds a train upon one track, and waits for that to pass him, and after that goes past him he can deliberately walk across to another track, on which he knows trains frequently run, without using his senses of sight or hearing, and still be in the exercise of due care.

The evidence in this case shows that this train, by which the plaintiff was injured, was running at a rate of fifteen miles an hour,—the testimony says fourteen to sixteen, and so it is fair to hold it was running at the rate of fifteen miles an hour. He walked across that track, and, walking at an ordinary pace, must have been going at a rate of about three miles an hour, or at the rate of three miles to the train running fifteen. In other words, the train was going five times as fast as the man. Taking these figures, we find that in computing the distance which this man had to walk, we must allow the width of the railroad track, being, as is well known, four feet eight and one-half inches between the rails, which he would have to cross; and that, of course, does not represent the whole distance, because there is the distance between the two tracks to be taken into account, which is more than the four feet eight and one-half inches, and is at least seven or eight feet, according to the testimony. Then, again, it is a matter of common observation that when

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we are standing by a railroad track, and a train is going by, we do not stand right up against the track; therefore it is clear that this man stood back more or less when the freight train went by him, and then having to pass that distance between where he stood, and then across the track over where the freight train had passed, and then the distance between that track and the next track, he would have to pass a distance of fifteen to twenty feet from where he started up to the first line of the track on which the passenger train passed. The case, therefore, comes down to this: that during the time he was passing this twenty feet the train would have run at least a hundred feet, as we have shown it was running five times as fast as the plaintiff was walking. So the uncontradicted evidence shows, therefore, that after this freight train passed by, and this passenger train was running towards him, he walked right towards the track, passed over a distance of fifteen or twenty feet, and, without using his eyes or ears, deliberately goes on to the passenger train track, and was run down. I cannot conceive of a case that shows contributory negligence more clearly than this. The slightest use of his eyes or his ears would have shown him that the train was coming; the merest glance of the eye would have discovered that fact. He swears himself he never looked, and never saw the train until he was struck. When he stepped upon that track the train must have been within ten feet of him, and yet he did not see it and did not hear it.

The only ground upon which the company could be held to be liable would be a failure to give signals. What is that idea of giving signals based upon? It is based upon the theory that the person to whom the signal is given will take notice of it. Signals are given by a railroad company to direct the sight or hearing. In these places warnings are frequently given by flag signals; and, according to the position of affairs as given in testimony by the plaintiff himself, if there had been a dozen flagmen to give these signals, and if these

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signals had been given, it is evident that this man would not have seen them, and they would have been of no use whatever. Here was a large train, running at a rate of fifteen miles an hour; his own testimony shows he did not look for it or see it. It would seem a hard case to hold that the company must be held liable because it did not give any signals, which, if they had been given, would not have benefited this plaintiff.

I do not base my ruling upon that question, however. Upon the ground of public policy it is not proper for the court or jury to adopt a rule which will free men from using a fair degree of care and diligence when they are in the position where, for their own safety, and for the safety of others, it is necessary they should act with care and prudence.

To my mind the plaintiff's own testimony shows clearly that there was culpable carelessness on the part of this plaintiff; and if the jury should find, on its being submitted to them, that he was in the exercise of due care (and otherwise they could not find a verdict for him), it would be my duty to set the verdict aside.

The motion will be granted, and the jury will be instructed to find a verdict for the defendant.

Ordered accordingly.

SEAMAN v. ENTERPRISE FIRE & MARINE INS. CO.

(Eastern District of Missouri. September, 1883.)

1. **INSURANCE — CORPORATIONS — STOCKHOLDERS HAVE INSURABLE INTEREST.**— A stockholder in a private corporation has an insurable interest in the corporate property.

Demurrer to petition.

McCRAEY, Circuit Judge (orally).— This case is before the court upon a demurrer to the petition. The demurrer presents the question whether a stockholder in a private corpo-

ration has such an interest in the corporate property as will authorize him to take a policy of insurance for the protection of his interest; in other words, whether he has an insurable interest in the corporate property. The cases in which the question as to what is an insurable interest has been discussed are numerous, and I do not propose to cite or comment upon them here. It is sufficient to say that the tendency of the modern adjudications on the subject is in the direction of holding an insurance company responsible in every case where the insured has any such interest in the subject-matter of the insurance as would subject him to pecuniary damage or loss in the event of its destruction. It is not necessary that the party who takes out the policy should have any title to the property insured; it is sufficient if he has such an interest in it as that by its destruction he would suffer pecuniary loss. There have been a great many attempts to define what is and what is not an insurable interest, and a great many cases, as I have said, in which that question has been discussed; but I think that what I have stated is perhaps the result of the great weight of the authority upon the subject; at all events, it is, in our opinion, the correct definition of an insurable interest.

It only remains, then, to determine whether a stockholder in a corporation may have such an interest as I have indicated. We are very clearly of the opinion that he may. It is true that the title to the property is in the corporation; that the beneficial interest is in the stockholders of the corporation. The stock of a corporation represents its property, and is evidence of the right of the stockholder to receive the profits and increase of the corporate property. It is a very plain proposition, in our judgment, that the destruction of the corporate property may entail pecuniary loss upon the stockholder, and therefore that he has a right to insure his interest as such stockholder. In this case the property was a steamboat, and the insured was the holder of a portion of the stock, which entitled him to three-six-

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teenths of the corporate property. He took a policy of insurance upon that interest, valued at \$1,000. Some question has been raised as to the measure of damages. It has been insisted on the part of the defendant that the corporation may be insolvent; that there may be many debts which must be paid before a stockholder can receive any dividends; and that, therefore, his interest may be nothing. We reserve all questions of this character until the trial of the cause, simply saying now that the loss of the policy holder must be shown upon the trial by competent evidence. It is also suggested that there may be a difficulty growing out of the fact that the insurance company would be entitled to be subrogated to the rights of the stockholder, in case they pay the loss. As to whether there is a right of subrogation it is not necessary now to determine; but, if there is such a right, we have no doubt that a court of chancery possesses ample power to enforce it. The adjudications referred to, in so far as they have dealt with this question, sustain the view of the court that stockholders in a corporation may have an insurable interest in the corporate property. There have not been many cases going directly to that point, but we think it is within the authorities, and well supported by the reason of the case.

With regard to the other matters set forth in the petition we have not considered them, because counsel did not press them. It must, of course, appear that the insured had an interest in the property at the time of the loss. If that has not been averred, it will be necessary to amend the petition in that respect. The demurrer to the petition is overruled.

Madill & Ralston, for plaintiff.

Given Campbell, for defendant.

McMillin and others v. St. Louis & Mississippi Valley Transp. Co.

**McMILLIN and others v. ST. LOUIS & MISSISSIPPI VALLEY
TRANSP. CO.**

(*Eastern District of Missouri. October, 1883.*)

1. **PATENTS—EQUITY JURISDICTION.**—Wherever, during the life of a patent, damages and an injunction are prayed for, in a suit against an infringer, equity has jurisdiction.
2. **SAME—PLEADING.**—In a suit for an infringement, it is unnecessary, where proof of the patent is made, to set it out, or any part thereof, except the title in the bill. Averments in general terms as to invention are sufficient.
3. **SAME—ALLEGATION OF INFRINGEMENT.**—A statement "that the defendant is now constructing, using and selling steam-power capstans for vessels, in some parts thereof substantially the same in construction and operation as in the said letters patents mentioned," is a sufficient allegation of an infringement.

In equity. Demurrer to the bill.

The bill prays for damages and an injunction. The life of the patent sued on has not expired. The remaining facts sufficiently appear from the opinion.

Paul Bakewell, for complainants.

Given Campbell and Parkinson & Parkinson, for defendant.

TREAT, District Judge.—There is a demurrer in this and several other cases, all pertaining to the same question. The contention as to the first point is that the decision of the United States supreme court (*Root v. Ry Co.* 105 U. S. 180) establishes the doctrine that where a patentee seeks for the use of his patent merely a stipulated royalty or license, he cannot proceed in equity for an infringement. That case was where damages were sought to be recovered for an infringement made against an expired patent before the expiration thereof. It does not, nor does any other case known to the court, oust equity of jurisdiction against an infringer

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where injunction is sought pending the life of the patent. Hence the demurrer as to that point is not well taken.

The second point is as to the insufficiency of the bill for defective description of this patent and the alleged infringement. The only description in the bill is that Mr. McMillin "was the true, original and first inventor of a certain new and useful improved application of steam-power to the capstan of vessels, not known or used before." The bill further states "that a description or specification of the aforesaid improvement was given in his schedule to the aforesaid letters patent annexed, accompanied by certain drawings referred to in said last-mentioned schedule, and forming parts of said letters patent. The said letters patent, and the said specification thereto annexed (which, or an exemplified copy of which, your orators will produce, as your honors may direct), were duly recorded in the patent office." The allegations as to infringement are: "That the defendant is now constructing, using and selling steam-power capstans for vessels *in some parts thereof* substantially the same in construction and operation as in the said letters patent mentioned."

References have been made to a large number of decided cases wherein it has been held unnecessary to set out in the bill the *specifications*, etc., of the patent of which profert has been made, the title having been distinctly stated. No well-considered case, however, goes to the length of declaring that there should not be brought into the bill, in some clear and distinct manner, a description, at least in general terms, of the nature and extent of the invention. The patent might have been for a mechanical device, a combination of devices, a product, a process, etc.

How, then, is the court to determine, under an allegation, as in this case, that defendant has used, etc., "some parts" of plaintiff's patent, what the case is? If the patent relied on is a combination patent, and the patent is referred to in general terms, is it sufficiently described by reference to the patent? To such rulings assent must be given by force of

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authority. Adjudged cases and text-books permit the averments of the bill to be in general terms as to the invention, reciting the title of the patent merely, and making profert of the letters patent. This court yields to the weight of authority and established precedents, although it might rule otherwise were the question presented *de novo*. A defendant in equity ought to be informed fully and clearly as to what is the plaintiff's demand, without being compelled to look at the profert and construe conjecturally the letters, so as to give the plaintiff some supposed right which the plaintiff does not specifically aver. How it arises that such departures from ordinary rules of pleading were passed into settled formulas it is useless to discuss; for it must suffice that the plaintiff has pursued established rules, to which this court defers. The demurrer will be overruled, and the defendant ordered to answer to next rule-day, with leave to plaintiffs to file replication forthwith.

UNITED STATES v. SOUTHERN COLORADO COAL & TOWN CO.
and others.

(District of Colorado. November, 1883.)

1. LAND GRANTS AND GOVERNMENT PATENTS — FRAUD — GRANTS TO FICTITIOUS PERSONS.— It is necessary to the validity of a deed that the grantee should be capable of taking title. A grantee being as necessary to the conveyance of land as a grantor, it follows that a grant to a fictitious person is void; and a patent for land to a fictitious person not in existence carries no title, and invests no interest in any one.
2. SAME — BONA FIDE PURCHASERS FOR VALUE.— The claim for protection by *bona fide* purchasers of land, for which patents have been obtained by fraud, can only be maintained by showing that the legal title has passed to them; but in a case where the original patents are void, and consequently the title never passed, the doctrine of *bona fide purchasers for value*, and without notice of fraud, cannot be invoked. On the principle that a grantor can convey no more than

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he possesses, he who comes in under the holder of a void grant can acquire nothing.

3. **SAME — LACHES ON THE PART OF THE GOVERNMENT.**— One of the limitations to the general rule that when the government becomes a party to a suit in its own courts it stands upon the same footing as individuals, and must submit to the law as administered between man and man, is that neither the defense of the statute of limitations nor that of laches can be pleaded against the United States. *United States v. Beebee*, 17 Fed. Rep. 88, distinguished.
4. **SAME — EQUITABLE ESTOPPEL.**— *Held*, not to apply, the respondents not being innocent purchasers within the meaning of the rule, and for the further reason that the government cannot be estopped by the frauds or crimes of its public officials.

On final hearing.

The facts appear in the opinion.

W. S. Decker, Special Assistant United States Attorney,
for complainant.

Lyman K. Bass, Wolcott & Milburn and John M. Waldron, for respondents.

McCRARY, Circuit Judge.—The important allegation of the bill is that the patentees named in the patents sought to be set aside,—sixty-one in number,—as well as the witnesses by whom proof of pre-emption purports to have been made, were all fictitious persons, having no existence in fact. It is averred that the pre-emption papers, together with the signatures thereto, were fraudulently manufactured by certain conspirators named, or other persons unknown, for the purpose of cheating and defrauding the complainant out of its title to the lands in question. In other words, the contention of the complainant is that the officers of the general land office were by fraud induced to execute patents to fictitious persons, so that there were in fact no grantees capable of taking title. We will first inquire whether the proof sufficiently shows that this is true as matter of fact. The bill sets out the names of the supposed pre-emptors and patentees, to the number of sixty-one, and charges that they are

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myths and fictitious persons, and that the names are fictitious names; that no persons by such names have ever lived or been known in the county of Las Animas, Colorado, where said lands are situated. It also sets out the names of persons purporting to have appeared as witnesses in these several cases, and makes the same averments as to them.

Although these averments are negative in character, yet as the complainant has made them the basis of its suit, the burden is upon it to show that they are, at least *prima facie*, true. Greenl. Ev. § 78; Whart. Ev. c. 7.

The complainant has accordingly called fourteen witnesses, who have resided in Las Animas county for a number of years, and who testify that they were well acquainted there, at, before, and since the dates of the several patents, and that during the years from 1870 to 1874 none of the persons named as patentees, with the exception of Juan B. Martine, were known in the county; and as to Martine, the proof is that a common laborer was known in Trinidad of that name. but that he never occupied any of the land in question. It is not probable that he was an actual pre-emptor, if all the other sixty were myths. It clearly appears by the evidence that none of the lands were occupied, or in any way improved, prior to the issuing of the patents, although in each case what purports to be an affidavit of the claimant is filed, setting forth that he is a citizen of Las Animas county, and has made settlement on and improved the land in good faith, etc., describing the improvements.

The proof is very clear that, with the possible exception of Martine, no such persons as those named as patentees either occupied the land or resided within the county at the time that the pretended entries were made. It was then a very new country, but sparsely populated, and it is incredible that so large a number of persons could have lived in the community, and that all could have been unknown to the leading citizens. At all events, the proof produced by the complainant is sufficient to shift the burden and make it

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necessary for respondents to come forward with proof to show that these supposed patentees were real persons. If such be the fact, it would have been easy for respondents to show it, although quite difficult for complainant to prove the negative. If sixty-one persons bearing the names of these patentees ever existed and actually appeared before the land officers at Pueblo as applicants for pre-emption, and if they produced living witnesses to testify for them, it certainly would not be difficult for respondent to identify them, or at least some of them; but if they never existed, it must, in the nature of the case, be difficult, if not impossible, to prove the fact of their non-existence by clear and positive evidence. All that is possible in such a case is to call as witnesses those who would probably have known them if they had lived at the time and place in question. The fact of their non-existence could be shown in no other way.

It is suggested in the argument that the proof is insufficient, because it only goes to show that none of the patentees or witnesses ever lived in Las Animas county, and does not tend to prove that they did not exist elsewhere. It would, however, be manifestly impossible for complainant to call witnesses to testify as to all localities; and besides, each of the supposed patentees must have resided in Las Animas county and actually occupied and improved the land patented to him, in order to be entitled to a patent at all, and each was required to swear to such residence, occupancy and improvement. If none of them were ever in the county, and no improvements were ever made upon the land, then the proofs upon which the patents issued were false, and the inference that the papers were manufactured without the presence of any persons bearing or assuming the names of the patentees is not more unreasonable than would be the inference that sixty-one actual persons committed perjury, and suborned as many others to perjure themselves as witnesses in order to acquire the title. At all events, I am clearly of the opinion that complainant can be required to

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do no more than to show that the supposed patentees did not live in Las Animas county, and that the lands in question had neither been occupied nor improved. If this is not sufficient to shift the burden, then it must follow that we should require the complainant to make the same showing with respect to every other community in the United States, and this can scarcely be seriously insisted upon. It would be very difficult to prove that these supposed persons did not exist in all space. "But jurisprudence has to do with no such vague domains. Its territory is limited. It inquires whether in a particular spot, at a particular time, open to human observation, a particular thing existed. . . . It is possible within such limited range to call all witnesses who were likely to have been at the given spot or observed the given persons at the particular time, and so to approach the negative by exhausting the affirmative." Whart. Ev. § 356.

The amount of proof requisite to support the negative proposition, and to shift the burden, will vary according to the circumstances of the case; and very slender evidence will often be sufficient to shift the burden to the party having the greatest opportunities of knowledge concerning the fact to be inquired into. Stephen, Dig. Law of Ev. art. 96. In the present case, to hold the respondents bound to produce evidence in support of the affirmative of the proposition — that these supposed patentees were actual persons — is, under the circumstances, both reasonable and just, because the proof of that fact, if it be a fact, is within their reach. The papers could not have been fabricated, as alleged, in the names of fictitious persons, without the knowledge of the register and receiver of the land office at Pueblo, and the bill distinctly charges that both these officers were parties to the fraud and conspiracy. What purport to be transfers from each of the supposed patentees to one Jackson, as trustee for the Colorado Coal & Town Company, are shown in evidence. Jackson, however, swears that he dealt only

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with one A. C. Hunt, who brought him the receiver's certificates properly assigned, and he never saw or knew any of the pre-emptors or patentees. He bought the lands from Hunt and paid him for them, receiving what appeared to be the usual evidence of title. It is fair to presume that Hunt dealt with the actual pre-emptors, if any existed, or, if he did not, he could state with whom he did deal, and thus put the inquirer on the road which would lead him to the original parties, if any such actually existed. It is conceded that the receiver is dead, but no reason appears for not calling either the register or Hunt; and the failure to do so is a circumstance, the significance of which the court is not at liberty to overlook. If the court could suppose that an innocent official, thus accused by a bill filed by the attorney-general of the United States, would fail to demand or at least request opportunity to vindicate himself under oath, it would be impossible to doubt that the respondents would have called him if the truth had been otherwise than as the bill alleges. It is insisted that it was the duty of the complainant to call these witnesses; but the court does not think so. The complainant having charged these persons with fraud and conspiracy, should not be driven to the necessity of calling them as its witnesses if it is possible for it to make out a *prima facie* case without doing so. The respondents, whose defense rests, at least in part, upon a denial of the charge of fraud and conspiracy made against these persons, could with perfect safety have called them if the charge is false.

Thus far no notice has been taken of the testimony of experts upon the question whether the signatures to the papers in question appear to be genuine signatures of different persons. The opinions of the expert witnesses differ, as is usual in such cases, but in my judgment this testimony, considered as a whole, confirms the theory that the papers were fabricated.

Having thus reached the conclusion that the supposed

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patentees in each and all the patents sought to be set aside were fictitious persons, having no existence, it only remains to determine what the consequences are with respect to the present respondents. And for the purposes of this inquiry I will assume that it sufficiently appears that respondents had no actual notice of, or participation in, the frauds whereby the patents were obtained. The rule of law that a grantee capable of taking the title is necessary to the validity of a deed, is elementary. A grantee is as necessary to the conveyance of land as a grantor, and it follows that a grant to a fictitious person is simply void. 3 Wash. Real Prop. (4th ed.) 265; *Muskingum Valley Turnpike Co. v. Ward*, 13 Ohio, 120; *Hulick v. Scovil*, 4 Gilman (Ill.), 175, 191; Martindale on Conveyancing, 234; *Hunter v. Watson*, 12 Cal. 363.

“By the common law all grants between individuals must be made to a grantee in existence, or capable of taking, otherwise there could be no such thing as livery of seizin.” *Miller v. Chittenden*, 2 Iowa, 368.

“A patent for land to a fictitious person, not in existence, carries no title, vests no interest in any one.” *Thomas v. Boerner*, 25 Mo. 27; *Galt v. Galloway*, 4 Pet. 332; *Galloway v. Finley*, 12 Pet. 297.

The case of *Sampeyreac v. U. S.* 7 Pet. 222, was a bill of review to set aside a former decree in favor of Sampeyreac, vesting title in him under an alleged grant from the governor of Louisiana, while it was a province of France, and which inured to the benefit of the claimant by virtue of the treaty of 1803. The grant and the decree founded thereon were attacked by the United States on the ground that Sampeyreac was a fictitious person. The court, per Thompson, J., said: “The original party to the decree being a fictitious person, no title could pass under the patent, if issued. It would remain in the United States.” Page 241.

I must hold, therefore, that, the patentees in this case being

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fictitious persons, no title passed from the United States by virtue of the patents in question.

There could be no conveyance of the title where there was no grantee to take the title. The patents were and are absolutely null and void.

The respondents claim protection as *bona fide* purchasers for value without notice of the fraud; but this defense can only be maintained by showing that the legal title has passed to them. The original patents being void for the want of the necessary grantees, as we have already seen, the title never passed from the United States, and the doctrine in question cannot be invoked. "The purchaser in all cases must hold the legal title, or be entitled to call for it, in order to give him a full protection of this defense; for if this title is merely equitable, then he must yield to a legal and equitable title in the adverse party." Story, Eq. Jur. § 64c. In the case of *Sampeyreac v. U. S.*, *supra*, this defense was interposed by the respondent Joseph Stewart, who was allowed to intervene and plead that he was a *bona fide* purchaser for value and without notice. The court, however, upon hearing, overruled the defense, upon the ground, among others, as stated in the opinion, that "on general principles it is incontestable that a grantor can convey no more than he possesses. Hence, those who come in under the holder of a void grant can acquire nothing." In that case, Stewart purchased upon the faith of a grant which had been confirmed by a decree of a court of equity in Arkansas territory. He was not protected, because both grant and decree were afterwards held fraudulent and void, on the ground that the supposed grantee in the one, and complainant in the other, was a fictitious person. The case is certainly as strong as the one before us. And see *Gray v. Jones*, 14 Fed. Rep. 83 (*S. C. 4 McCrary*).

In the light of these principles and authorities it is impossible to hold that the respondents, or any of them, have acquired a right to the land in controversy by reason of their

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standing in the character of *bona fide* purchasers. The title has never passed from the United States. A person who has acquired title by fraud may make a valid conveyance to a *bona fide* purchaser, but one who has never acquired the title cannot convey it, and much less can the title be transferred by fraudulently obtaining from the owner a deed purporting to convey it to a fictitious person, and then forging a conveyance from such fictitious person to another, however innocent the latter may be.

The counsel for respondents have argued very earnestly that, as this is a suit to rescind and set aside a deed for fraud, the rule which requires the injured party, upon discovering the fraud, to give notice of his intention to rescind without delay, applies and bars relief. The bill was filed in January, 1880. It is insisted that complainant had notice of the fraud as early as November, 1873, through a letter received at the general land office at Washington from one E. J. Hubbard. The letter is in evidence, and is as follows:

“LAW OFFICE OF GRAHAM,

“TRINIDAD, COLORADO, November 28, 1873.

“*Honorable Commissioner United States Land Office—*

SIR: The most gigantic frauds upon the department you control are being perpetrated in this portion of Colorado. Coal lands are being entered as agricultural lands by *straw men*, and conveyances made to the procurers of these perjuries, who pretend to be innocent in the matter. This portion of Colorado is all coal land. Townships 33, 32 and 30, in range 64, are coal lands (every section), except a little of the river bottom. There are over thirty townships north of range 33 and west of 63 that have coal on every section, and the agricultural land does not exceed three sections. These parties even sell out and then apply to the general land office to change the location of the lands patented. Of this latter I am advised by common rumor.

“The people rely on the laws to protect and ask the de-

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partment to assist them in their rights. There is something out of proportion in our land office.

"The register and receiver are charged with complicity in these things.

"If the United States attorney will take the matter in hand, the matter can be fastened on the proper parties; but in the meantime, unless your department is vigilant, and dishonest men thwarted, the government is defrauded of thousands of acres of its most valuable coal lands. I am, very respectfully,

E. J. HUBBARD."

[Indorsed]:

Letter K, No. 78,067, E. J. Hubbard, Trinidad, Colorado territory, November 28, 1873. Alleges fraud on the government, etc. Answered December 11, 1873. Referred to Div. N. Received (G. L. O.) December 3, 1873.

It will be observed that this letter designates no particular entries as fraudulent, and describes no particular lands that were being fraudulently entered. The writer's purpose, which was most laudable, seems to have been to induce the land department to institute an investigation. It is more than doubtful whether this letter can be regarded as a sufficient notice to the United States of the existence of the particular frauds now in question, even assuming that a volunteered communication from a private citizen to a bureau officer in the interior department could, in any case, be held to charge the government with notice of its contents. Waiving, however, the consideration of this question, I am constrained to hold that laches cannot be imputed to the government. It is true, as a general proposition, that when the government becomes a party to a suit in its own courts it stands upon the same footing with individuals, and must submit to the law as it is administered between man and man. But this general rule has its limitations, and one of them is that neither the defense of the statute of limitations nor that of laches can be pleaded against the United States. "The general principle is that laches is not imputable to the

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government; and the maxim is founded, not in the notion of extraordinary prerogative, but upon a great public policy. The government can transact its business only through its agents; and its fiscal operations are so various, and its agencies so numerous and scattered, that the utmost vigilance would not save the public from the most serious losses, if the doctrine of laches can be applied to its transactions."

United States v. Kirkpatrick, 9 Wheat. 736; *United States v. Hoar*, 2 Mason, 311; *United States v. Williams*, 5 McLean, 133; *Gibson v. Chouteau*, 13 Wall. 92; *United States v. Thompson*, 98 U. S. 486; *Gauson v. United States*, 97 U. S. 584.

If, indeed, the lapse of time since the cause of action accrued has been so great as to afford the reasonable presumption that the witnesses who could testify concerning it are all dead, and the proofs lost or destroyed, a court of equity may no doubt on that ground refuse to entertain the controversy. *U. S. v. Beebe*, 4 McCrary, 12 (S. C. 17 Fed. Rep. 36). But this cannot be claimed upon the facts of the present case. At most, the lapse of time here was only six or seven years, and it is not claimed that the witnesses who could testify from personal knowledge of the facts are all dead, nor that the proofs have been lost or destroyed. Independently of these considerations, it is difficult to see upon what principle this doctrine concerning the duty promptly to rescind can be applied to a case of this kind, where there never was a contract in the sense of an agreement between contracting parties. The rule requires the defrauded party to give notice, to the party guilty of the fraud, of his purpose to rescind and demand a return of the property conveyed. But where the other party has no existence, where the conveyance has been made to a myth, how can this rule be applied? To whom shall notice be given? Upon whom shall demand for a return or reconveyance of the property be made? It is also insisted that the United States has not returned the money received

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for these fraudulent conveyances, and that, therefore, this suit cannot be maintained. Without considering whether the government is bound, as a condition precedent to its right to file a bill to set aside a fraudulent patent, to pay or tender to the patentee the consideration received, it is sufficient to say in the present case that there are no patentees, and therefore no one in existence to whom such payment could properly be made.

The counsel for the respondents insist that the complainant ought to be bound by the patents issued, even though the patentees were myths, because the respondents have acted in good faith upon the assumption that they were valid, relying upon the record. It is insisted that the facts present a case of equitable estoppel, upon the theory that "when one of two innocent persons must suffer a loss, it should be borne by that one of them who, by his conduct, acts or omissions, has rendered the injury possible." It is a conclusive answer to this contention to say that the respondents are not innocent purchasers within the meaning of the rule, as we have already seen. But I think it proper to add that, so far as I know, it has never been held that the United States can be estopped by the frauds, not to say crimes, of its public officials; and it is apparent that the consequences of such a doctrine would be ruinous. In my opinion the doctrine of estoppel does not apply.

Upon the whole case my conclusion is that there must be a decree for complainant in accordance with the prayer of the bill, and it is accordingly so ordered.

WOODWORTH v. ST. PAUL, M. & M. R'y Co.

(District of Minnesota. October, 1883.)

1. PERSONAL INJURY — NEGLIGENCE — CONTRIBUTORY NEGLIGENCE — DUTY OF RAILROAD COMPANIES TO EMPLOYEES. — Railroad companies are not insurers of the life and limb of their employees, and the duty

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and obligation which the law exacts from a railroad company towards its employees is not as high as that towards its passengers. Ordinary care is the rule which is applied to a railroad company with regard to its duties towards its employees. Under this rule is the obligation to keep its machinery and all other things used in the operation of the road in proper order and repair, so that its employees will not be injured by reason of any defects in such machinery or working apparatus.

2. **SAME — RISKS OF BUSINESS.**—An employee cannot recover for an injury resulting from one of the usual risks or hazards connected with the business into which he has entered, and which the law will consider he assumed when undertaking the duties of the position.
3. **JURISDICTION — CHANGE OF RESIDENCE DEPENDENT UPON INTENTION.**—Whether a man has changed his residence from one state to another, so as to have become a citizen of the latter, must depend very largely upon his intention. The mere fact of a prolonged absence from one state, and continued residence in another while attending to business or pleasure, is not in itself enough to constitute a change of citizenship; it must appear that the person has left the former state with the intention of resigning his citizenship there. The fact that a man continues to vote in the state from which he came, and owns a farm there, tends to show that he is a citizen thereof.

At law.

Plaintiff seeks to recover damages for an injury caused to him while in the employ of the defendant in coupling freight cars, on two grounds. *First*, that the draw-heads of the two cars that he was required to couple were of different makes and uneven as to height, which was unknown to this plaintiff, and which he was unable to see, owing to the fact that the railroad iron with which one of said cars was loaded projected over the draw-bar so as to conceal the fact that it was of a different height from the other car; and *secondly*, on the ground that after the plaintiff had given the proper signal to the engineer to move the cars together, the defendant's yard-master carelessly, and without warning this plaintiff, gave another sign to the engineer, by reason of which the cars were violently pushed together, and, owing to these two acts of carelessness on the part of defendant,

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the plaintiff was injured in attempting so to couple the cars. The defendant claims that the yard-master gave no such order, and, while admitting the fact that the draw-heads were of different heights, claims that this is usual and unavoidable, and that the cars could have been easily coupled by the plaintiff by the exercise of ordinary care.

C. K. Davis, for plaintiff.

R. B. Galusha, Bigelow, Flandreau & Squires and *J. Kling*, for defendant.

SHIRAS, *District Judge (charging jury)*.—There is a question, preliminary in its nature, as affecting the results of this case, upon which the court has been requested to instruct you, and which is fairly presented by the issue made in the pleadings, and that is in regard to the citizenship of the plaintiff. Under the law this court of the United States has jurisdiction only between citizens of different states, or between an alien and a citizen. If it should appear in the progress of the trial of this case that the plaintiff and defendant were at the time the action was brought citizens of the same state, then this court has no jurisdiction to try this case; and whatever verdict the jury might find, and whatever judgment the court might pronounce, would be void, for the reason that under the constitution of the United States the court would have no jurisdiction to hear and determine the case. Therefore, to enable a party to maintain an action, it must appear, and it must be true, that the parties are citizens of different states, or one party must be an alien. In this particular case it is averred that Woodworth, the plaintiff, is a citizen of the state of Maine, and the defendant, the St. Paul, Minneapolis & Manitoba Railway Company, is a citizen of the state of Minnesota. Corporations are deemed, within the meaning of the law, to be citizens of the state wherein they are created, and there is no question in this case but that the defendant is a citizen of the state of Minnesota.

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If it be true that when this action was brought the plaintiff was a citizen of the state of Minnesota, then this action cannot be maintained in this court. It would not defeat his remedy, but simply this court would not have jurisdiction, and he would have to bring this action in the state court. The question has been raised whether this plaintiff was not really a citizen of the state of Minnesota at the time that this action was brought. If you find from the evidence that he was a citizen of any state other than the state of Minnesota, then the action can be maintained, and the court has jurisdiction to hear and determine the controversy. Citizenship, so far as the state is concerned, is ordinarily determined by residence. In other words, residence is evidence of citizenship, but that must be taken with a qualification. A party may be a citizen, for instance, of the state of Minnesota. We have a right, any of us that are citizens of this state, to go to another state, take up our residence there, do business there, and remain there quite a length of time; still, if we go there with the intention of returning to the state of Minnesota, however long we may be gone,—weeks, months or years,—we are still citizens of the state of Minnesota. A person may go around the world and travel, and reside in different places for some time, and still be a citizen of the state of Minnesota, provided he had a *bona fide* intention of coming back again. So a man may be a citizen of the state of Maine, and go to different places from time to time, wherever he can obtain work, and yet continue to be a citizen of the state of Maine.

The question really is, what intention the man had when he left his own state for the purpose of procuring work. When he leaves, is it with the intention of taking up a permanent residence in some other place and abandoning his place of residence in the state he leaves, or is he still intending eventually to return there? To illustrate: those who are in the employ of the United States at Washington as department clerks go there for several years; they may be even

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commissioned for a given length of time, or for an indefinite time; still they continue ordinarily to remain citizens of the state from which they started, and they are supposed generally, when they leave their situations, to return to the state which they left.

The evidence of the plaintiff is before you, and that is all the evidence before you, with regard to his citizenship; it is for you to determine whether, under the testimony, he was a citizen of the state of Maine when this action was commenced, and you will give such weight to his testimony with regard to that fact as you think it deserves.

You may also take into consideration in the determination of this question the fact of the plaintiff voting and his having a farm in the state of Maine. If it appears that a man does not vote here, but continues to vote in the state from which he came, has a farm there, and states he leaves it not with the intention of remaining away, all these are matters of evidence which tend to show that he remains a citizen of that state, and would justify you in finding that he is a citizen of the state from which he came. But, as a matter of law, if you find the fact to be that when this action was commenced this plaintiff was a citizen of the state of Minnesota, then this action cannot be maintained in this court, and it will be your duty to find upon that fact. If you find for the defendant upon this issue you should state in your verdict that you find for the defendant upon the question of the citizenship of the plaintiff, so that there may be no question in the future as to his right to bring an action in another court.

Passing this question — which, as I said before, is preliminary, and does not affect the merits of the case,— if you find that the plaintiff was a citizen of the state of Maine a year ago, when this action was commenced, you will then pass to the other issues in the case, and upon them I will proceed to give you instructions as to the law that is applicable to them.

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In this case the plaintiff, Woodworth, seeks to recover from the defendant damages for an injury which he alleges he suffered while in the employ of the company in the position of a brakeman or switchman in the yards of the defendant corporation. There is no conflict upon these questions, and it is admitted on both sides that the plaintiff was in the employ of the railroad company, and while there in the ordinary line of his duty he undertook to make a coupling between two cars, and while doing so he received this injury. There is no dispute upon this fact; the question in issue is as to the liability, and upon whom the responsibility for this accident was. Now, it is not sufficient for the plaintiff to show that there was an accident, and, as the result of that, an injury was inflicted upon him, because these railroad companies are not insurers of the life and limb of their employees. The duty and obligation which the law exacts from railroad companies towards its employees is not as high as that towards its passengers; they being common carriers, the law imposes a very high degree of care in the carriage of passengers, and makes them almost insurers of the safety of their passengers. But in regard to employees a different rule of care is applicable from that which is held towards passengers.

In the case of employees there is exacted from the railway company that the company, through its agents, shall exercise ordinary care, and that is defined to be that amount of care that an ordinarily prudent man would exercise under the same circumstances. Of course, the amount of care varies with the circumstances that surround the object and the party. Therefore you must apply this rule with regard to the circumstances that surround the parties when called upon to act. Now, the law requires of these railroad companies that they should use proper and suitable machinery and apparatus, and that the cars that their employees are required to work upon should be kept in good order. That is a duty which the railroad company owes to its em-

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ployees. Still accidents will happen; something may get out of order; and if the employee knows of this, and yet deals with the machinery so out of order, he deals with it knowingly and understandingly, and is not misled. Still a railroad company should keep its machinery in good order, so as not to cause risk to the employee. But the plaintiff cannot recover by simply showing that there was an accident and an injury. He must go further, and show that the accident of which he complains resulted from some negligence on the part of the company; that the company did not discharge its duties towards him; that there was some negligence or fault on the part of the company.

If it appears from the evidence in the case that the plaintiff received the injury by negligence on his part, then that defeats his right of recovery. The rule of law upon that is that, though you should find that the accident was caused by or resulted from negligence on the part of the railroad company, still, if the plaintiff contributed to the accident, so that the accident was caused partly by his negligence, then the plaintiff cannot recover. If he, by his own negligence, contributed to or aided in the accident, he cannot complain of the other party and is without remedy.

When a person enters into the employ of the railroad company, he assumes all the usual risks and hazards pertaining to the business of railroading properly conducted. That is the general rule applicable not only to railroad companies, but also to all employees. Some businesses are more hazardous than others; from their very nature that cannot be prevented — there is more risk attached to them; and an employee or person who chooses to enter into such employment assumes the risks and hazards of the business when properly carried on; and if he is injured in one of these ordinary risks or hazards pertaining to the business, he is without remedy; it is one of the risks he has assumed, and he cannot recover if he is injured thereby.

Coming down, now, to this case as it is presented before

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you, the plaintiff seeks to recover on two grounds. He claims, first, that the draw-heads on these cars were uneven, and were dangerous by reason of that fact, and therefore that the coupling together of these cars was rendered dangerous by reason of the fact that these draw-heads were uneven.

As I have already stated in a general way, the duty is upon the railroad company to keep its machinery — that is, its cars and machinery that are used in the operation of the railroad — in proper order; and if these draw-heads, or anything that is used in coupling cars, get out of order, or are in bad order, that is the fault, ordinarily, of the railroad company, because the duty and obligation lies upon the railroad company to use due care, and see that they are kept in good order. It is their duty to repair them, and to keep them in repair, and if they neglect to do so there is a fault on the part of the railroad company. And when it appears that the draw-heads are out of order, and an employee is injured by reason thereof, he would have a cause of action against the company, if they are shown to be in fault. But in this particular case there is no evidence to show, and it is not claimed, that the draw-heads themselves were in bad order, or were in bad condition. The difficulty that arises here is not from the bad condition of the draw-heads, but from the fact that draw-heads of different makes and styles are brought together at the time of making the coupling to couple the cars together. There is no evidence that the draw-heads were in bad order, and the company cannot be said to be in fault in this case on account of the draw-heads being in bad order; so that if any responsibility is upon the company it must be drawn from another source.

That brings us to the consideration of whether the company can require an employee to couple cars where the draw-heads are of different make, style and construction.

The uncontradicted evidence shows that, from the very business this company carries on, they receive, and expect

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to receive, and their custom is to receive, and they are in fact bound to receive, these cars that are brought over connecting roads. We all know it to be the fact, and circumstances and the evidence show that all these railroad companies are more or less expected to receive, and do receive, cars from all the different lines of the country, and it follows, and is one of the necessities of the business, that these cars should be brought together and coupled, though having upon them draw-heads of different makes and construction. An attempt to enforce any other rule would require and compel every railroad company in the United States to have just one make of draw-head. It would be impossible to do that, and I instruct you, therefore, that in this case negligence could not be predicated and found by you to exist against this railroad company simply and solely from the one fact that these cars had different draw-heads upon them. The uncontradicted evidence that is before you shows that the men that go into this business of switching and brakeing expect and know that they will be required every day to discharge their duties in coupling and uncoupling cars with different draw-heads, both in the day-time and in the night-time. It is from the very necessity of the case that these cars are brought together in the yards of the company, and are coupled together there, that this result must follow. I therefore instruct you that that fact,—that these cars had different bumpers, of different makes and shapes, even though they did not match,—that fact alone would not constitute negligence in the company.

Some stress has been laid upon the fact that there are inspectors; but you see it would be impossible to change this fact; that would require them to change the very make of the car, and that is not done upon any railroad, as far as the evidence goes, and I don't think that obligation is laid upon a railroad company. A railroad company has a right to make connections with its cars with other cars of different makes; and although that may impose a greater risk and a

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greater hazard upon the employee of the company, still it is one of the risks that pertain to the business, as it is generally carried on, and it is a risk and a hazard which the employees themselves assume when they undertake the business.

It is further claimed that there is a liability on the part of the railroad company, on the ground that Jarvis, the yard-master, negligently gave an order and instruction to the engineer to back the train and accelerate its speed at the time when the plaintiff was in the act of undertaking to make the coupling between these two cars.

Now, the first question for you to determine is whether or not the yard-master, Jarvis, gave any orders to control the movement of the cars at the time of the accident. Did he, by any order or communication, either by signal or word of mouth, or by both combined, give any orders to the engineer controlling the movements of that train or engine with cars attached? If he did not do that, then no negligence can be predicated against the company by reason of the acts of Jarvis. If he gave no orders, then he was not in fault, and if he was not in fault the company was not in fault. If he did give any orders to the engineer, was he wanting in the exercise of due care when he gave these orders? That is to say, was he wanting in the care that an ordinarily prudent man would exercise under the same circumstances? Here you will have to consider the position the plaintiff occupied in coupling these cars, and what the testimony shows is the ordinary rule and way in which these couplings are made. There has been testimony introduced to show that when these couplings are made the brakeman is required to go between the cars to couple them, and is ordinarily required to give signals to control the movements of the engine, and to instruct the engineer at what speed to approach the cars. If it be true that the plaintiff, as a brakeman, gave the signal to the engineer which he deemed to be proper, and directed the engineer how he, the brakeman, desired to have the cars moved, when they came up to

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make this coupling, and then after giving this signal the brakeman passed between the cars, so that he might make the coupling, or attempt to make it, then you will determine whether any action which Jarvis took affected injuriously the movement of these cars, so that the plaintiff was a sufferer thereby. Then, under these circumstances, I would charge you that Jarvis, although he was the yard-master, and a superior officer to this plaintiff as a brakeman, would have no right to give any order or direction, or to change the previous order that had been given by the brakeman, so as to subject the brakeman, without any knowledge on his part, to any additional risk. The yard-master might give orders, undoubtedly, if he saw there was any supervening necessity therefor. The yard-master was standing there with supervisory power; and if the yard-master saw there was reason, he might give the order, and he would have a right to give the order. Any brakeman would have a right to warn the engineer of danger, because that is a sudden emergency in which he may act. But when he exercises that power he must be careful that he does no act which is negligent in its character. In other words, a brakeman may direct the engineer to move up to make a coupling in a proper manner, and if the yard-master then gives an order which the engineer obeys, and which results in sending back the cars with such greater power and force that it thereby imperils the life of a brakeman, that would be negligence which would justify you in finding that the yard-master was negligent in giving such an order as that.

That was only an illustration, and not meant to intimate any facts in this case. I am endeavoring to instruct you upon what my idea of the law is that is applicable in this case. The yard-master must not unnecessarily interfere with the movements of a train when a brakeman, having given an order, has gone between the cars, and when he has a right to suppose that the engineer will follow out the instructions that he has given him. What do you find the

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facts to be in this case? Did the plaintiff, before he went between the cars to make that coupling, give the order and direction to the engineer how he wanted the train of cars to be moved? If he did, and then passed in between the cars to make the coupling, he had a right to suppose that the train would be moved up in obedience to his orders, and that there would be no change therefrom. If the yard-master saw that it was absolutely necessary to change that order, he might do so, having regard to the safety of the brakeman who was between the cars. Now, then, what order did Jarvis give? It is for you to determine what order, if any, he gave; and you are to determine what, if any, effect that order had upon the movements of the train, if you find from the evidence he gave any orders.

If you find from the evidence that that order was obeyed by the engineer, but that it did not increase the risk,—did not contribute towards this accident,—then there is no complaint to be made against the company. Jarvis, in that case, was not in fault, unless the true reason of the causing of the accident was his order to the engineer. If that did not cause the accident no responsibility can be placed upon the company therefor. But if you find from the evidence that he gave an order, which order, under the circumstances, he was not justified in giving, with exercise of due care on his part, and that order resulted in accelerating the motion of the train, and thereby rendered the business of the brakeman more hazardous, and resulted in causing the accident to the plaintiff, then you would be justified in finding that the company was responsible for the injury which resulted to this plaintiff under these circumstances. But if you find that Jarvis gave no orders but what he was justified in giving under the circumstances, or if he gave no order at all, or if you find that what he did give had no effect upon the accident, then your verdict should be for the defendant.

There is another principle you must bear in mind. If it appears from the evidence—it is a matter of defense in a

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case of this kind — if it appears from the evidence that the plaintiff himself had been guilty of negligence that contributed to the accident, that is a matter of defense, and ordinarily it is for the defendant to make out their defense from their own testimony; but in a case of this kind their defense of contributory negligence may be made out from the testimony of the plaintiff; but, as far as your duty is concerned, it is for you to determine, from all of the evidence in the case, no matter which side may produce it, and answer this question: Did the plaintiff contribute to or cause this accident through any fault or negligence on his part? If he did, then he cannot recover, because if it happened by any of his own negligence he cannot maintain this action. If he did not, and no want of care on his part contributed to or caused the injury, so that he was in the exercise of due care, then his right of action would not be defeated. The evidence has been before you showing exactly what was done during the making of this coupling, the position that the plaintiff occupied, and how the plaintiff undertook to make this coupling. The evidence has been before you showing you the usual and proper way in which couplings of this kind are made. It is for you to say whether the mode of this coupling, the way in which it was made, was with the exercise of due care on the part of the plaintiff. It is for you to determine whether or no the plaintiff has been guilty of the want of due care upon his part in the performance of that duty; and if you think he has, then he cannot recover. But if he has not, then, if you find the other issues in his favor, he would be entitled to a verdict at your hands. If you find in favor of the defendant, then you have nothing more to do than simply to say, we, the jury, find for the defendant. If you find in favor of the plaintiff, then you will be required to estimate the amount of damages to which he is entitled. In the first place, the damages to which the plaintiff would be entitled is a reasonable compensation for the pecuniary loss he has suffered. It is pecuniary compensation you make to

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him for the loss that has arisen to him by reason of this accident.

One element of damage you may take into consideration, under the evidence, in this case, is a reasonable compensation for the pain he has suffered in the past, and may suffer in the future. Then, also, the loss of time, when, by reason of the wounds he received, he was unable to earn anything, and the time he lost when he was having himself properly cared for; a reasonable compensation is to be made to him for that. And then the injury to his hand, and the loss of his fingers, and the consequent effect upon his ability to labor. Of course, it is uncontradicted that the result of this accident to the plaintiff was the loss of two of his fingers; and he is therefore entitled to be compensated for the loss of bodily strength, and the loss of his ability to labor in whatever business he may engage; and the question for you to determine is, what a fair and just compensation for that would be. Of course, it is impossible for the law to lay down any fixed rule that is to govern you in awarding a sum in this case. It is necessarily left to the sound discretion of the jury to fix such reasonable sum as they believe will compensate the plaintiff for the injury he may have received; and in cases of this kind the damages are to be determined without any reference to the character of the defendant. The injury to the plaintiff is no greater by reason of the fact that the defendant is a railroad company, than if he suffered it at the hands of a farmer upon his farm. The injury to him and his is just the same, and it makes no difference that the defendant is a corporation; and you should not allow that fact to have any effect upon your minds as to the issues between the parties, or as to the amount of the damage, if you come as far as that question. The plaintiff is entitled in all cases to a fair compensation for the injuries he has received. They are not to be lessened nor increased by reason of the fact that the defendant is a

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railroad corporation. You are to decide this case as though it was an action pending between two individuals.

I believe that is all that is necessary to instruct you with regard to the law of the case.

The jury returned a verdict for the plaintiff for \$1,000.

BROOKS v. COQUARD.

(Eastern District of Missouri. November, 1883.)

1. **CONTRACTS — SALES — DAMAGES.**— Where A., in St. Louis, telegraphed to B., in New York, an offer to sell stock at a certain price, "St. Louis delivery," and B. answered by telegraph, "Accept your offer; draw on me with certificate attached payable at office of C., New York," and afterwards telegraphed to know whether the stock could be delivered, and was answered, "Will ship to-night if you pay expenses; sale was St. Louis delivery;" and replied, "All right; add expenses of forwarding to draft," and A. then refused to deliver, and at the time of the refusal the market value of the stocks was higher than when the sale was closed: *Held*, (1) that the contract of sale was closed by the sending of B.'s first telegram; (2) that the contract was for a delivery at St. Louis; (3) that B. was entitled to the difference between the market value of the stock at St. Louis at the time of the sale and its value at the time of A.'s refusal to deliver, with legal interest.

At law.

Suit for breach of contract to sell three hundred and ninety-two shares of the common stock of the Louisiana & Missouri River Railway Company, at \$26 per share. The contract of sale was made by telegraph. The case was tried by the court without a jury. At the trial copies of the following telegrams were introduced in evidence:

"St. Louis, February 14th.

"*James I. Brooks, Boston:* Will sell 392 shares L. & M. common at 26, St. Louis delivery. Order good until 10 o'clock to-morrow A. M.

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"BOSTON, February 15th.

"*L. A. Coquard, St. Louis:* Accept your offer. Draw on me, with certificate attached, payable at office of Charles Head & Co., 11 Wall street, New York.

"Sent at 9 A. M.

JAMES I. BROOKS.

"BOSTON, February 15th.

"*L. A. Coquard, St. Louis:* Accepted your offer early this morning. It is all right. Offer any more stock you may have.

JAMES I. BROOKS.

"BOSTON, February 15th.

"*L. A. Coquard, St. Louis:* When can you deliver stock bought this morning? Answer.

JAMES I. BROOKS.

"ST. LOUIS, February 15th.

"*James I. Brooks, Boston:* Will ship to-night if you pay expense. Sale was St. Louis delivery.

"L. A. COQUARD.

"BOSTON, February 15th.

"*L. A. Coquard, St. Louis:* All right. Add expense of forwarding to draft. Have you any more?

"JAMES I. BROOKS.

"ST. LOUIS, February 15th.

"*James I. Brooks, Boston:* As you have not complied with my terms, I here declare sale and all orders to sell La. & Mo. Com. off.

L. A. COQUARD."

The telegrams were sent in the order in which they appear above. Evidence was introduced tending to prove that, at the time the last telegram was sent, Louisiana & Missouri common was selling for one per cent. of its par value more than at nine o'clock in the morning, when Coquard's offer was accepted. It was contended on behalf of the plaintiff that the contract was for a delivery at New York, and that he was entitled to the difference between the price at which he bought and the market value of the stock in New York on the day on which it would have reached there if shipped the day of the sale.

Scruggs and others v. Baltimore & O. R. Co.

Taylor & Pollard, for plaintiff.

Fisher & Rowell, for defendant.

TREAT, J. The contract must be considered closed on February 15th; hence the plaintiff is entitled to damages at St. Louis rates on that day, the defendant having then given notice of refusal to fulfil the contract.

Judgment is therefore given at the rate of one per cent. advance on three hundred and ninety-two shares, viz., for \$392, with interest at the rate of six per cent. from the day on which the contract was broken.

SCRUGGS and others v. BALTIMORE & O. R. Co.

(*Eastern District of Missouri. November, 1883.*)

1. COMMON CARRIERS — NEGLIGENCE — EXCEPTED PERILS. — When goods, which a common carrier has undertaken to transport, are lost *in transitu* by fire, through its negligence, it is liable, even where its bill of lading provides that it shall be exempt from liability in case of loss by fire.
2. SAME — BILL OF LADING — LIMITATION OF LIABILITY. — Where it was orally agreed between A., a shipper, and B., a common carrier, that the latter should transport all goods which the former desired to ship from X. to Z., for a certain sum per hundred pounds, regardless of value, and A. shipped certain packages by B. under said agreement, but took a bill of lading therefor, which provided that unless the shipper had the value of his packages inserted in the bill of lading given for them the carrier would not be liable for an amount exceeding \$50 on each package, but the values of the packages were not asked for by B. or inserted in the bill of lading, and the goods were lost *in transitu* through B.'s negligence, *held*, that B. was liable for their full value.

At law.

This is a suit brought to recover the full value of certain goods which were lost by fire through the defendant's negligence while being transported by it from New York to St. Louis. The plaintiffs shipped said goods under an oral

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agreement with the defendant by which the latter undertook to transport all such goods, regardless of their value, for a certain sum per hundred pounds. The bill of lading received by plaintiffs' consignors from defendant's agents provided, however, that unless the shippers had the values of their packages inserted in the bill of lading given for them the defendant would not be liable or responsible for an amount exceeding \$50 on each package. It also provided that defendant should not be liable in case of loss by fire.

The values of the packages shipped were not asked for by defendant, however, and were not inserted in the bill of lading.

Thomas Metcalf, for plaintiffs.

Garland Pollard, for defendant.

TREAT, *District Judge*.—The evidence disclosed that the loss was caused by the negligence of the defendant; therefore the exemption as to the fire in the written bill of lading, if applicable, would not change the result. The only question concerning which there was difficulty related to the required valuation of the property shipped. It is a correct rule that where special values connected with shipments should be disclosed, and the contract between the parties called therefor, with limitation agreed, such agreements should be upheld. The case before the court shows that shipments of goods in the ordinary course of plaintiffs' business were to be made under a verbal agreement with respect to the rates therefor. Of course, it must be held to be within the contemplation of the parties that shipments should be in the ordinary course of such transactions. No limitations as to the values were made by the oral agreement; nor does it appear that there was any extraordinary value outside of plaintiffs' usual course of shipments; hence the loss having occurred through the negligence of the defendant, the plaintiffs are entitled to recover the full value of the goods forwarded, with interest.

Judgment, therefore, is rendered for \$4,077.

National Pump Cylinder Co. v. Simmons Hardware Co.

NATIONAL PUMP CYLINDER CO. v. SIMMONS HARDWARE CO.

(Eastern District of Missouri. November, 1883.)

1. PATENTS — EVIDENCE. — Where, in a suit for the infringement of re-issued letters patent, the defendant sets up as a defense that the re-issued letters patent are broader than the original, and therefore invalid, and the plaintiff fails to introduce the original letters patent in evidence, the defendant may introduce them.
2. SAME — INQUIRY INTO VALIDITY OF REISSUED LETTERS PATENT. — Where the original letters patent are so introduced, the question as to the validity of the reissued letters patent may be passed upon.
3. SAME — REISSUED LETTERS PATENT No. 7,006, FOR "IMPROVEMENT IN PUMPS," VALID — PATENT CONSTRUED. — Reissued letters patent No. 7,006, for an "improvement in pumps," are no broader than the original letters patent No. 90,143, issued for the same invention, and are valid. They are for a metallic tube with vitreous coating internally, and with both ends flared so as to admit within it, from above and below, the wooden tubing with which it is designed to be connected.
4. SAME — INFRINGEMENT. — The sale and use of enameled tubes with a *single flare held* no infringement.

In equity.

Suit for an infringement of reissued letters patent No. 7,006, for an "improvement in pumps." The original letters patent are numbered 90,143. The "invention relates to certain novel improvements in wooden pumps, and consists — *First*, in constructing one of the sections or lengths of the pump-stock of metal, lined with a vitreous enamel, to present a smooth, durable surface to the pump-bucket or piston-packing, and adapted to receive within its ends the tapering ends of the wooden sections, and thus serve as a coupling for these sections, as will be hereinafter explained; *second*, in an annular-grooved ring-piston, which has confined within its groove a suitable packing, and which is constructed with an annular valve-seat on its upper side, adopted for a circular valve which moves freely upon a central valve stem."

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The original letters patent contain two claims, viz :

“(1) The metal-tube section, B, coated with a vitreous substance, and constructed with flaring ends, and receiving into said ends the lower terminus of the wooden section, A, and the upper terminus of the lower wooden section, B, all substantially as described. (2) An annular-grooved ring-piston, D, constructed with a raised valve-seat, *v*, and a forked stem, *i*, *c*, in combination with valve, *g*, substantially as described.”

The claims in the reissued letters patent are as follows:

“(1) The metal section, B, lined with a vitreous substance, and formed so as to connect the wooden sections, A and C, by frictional contact, without the use of bolts, screws, or other fastening device, substantially as set forth. (2) The metal tube section or working band, B, coated with a vitreous substance and constructed with flaring ends, and receiving into said ends the lower terminus of the section, A, and the upper terminus of the lower section, B, all substantially as described. (3) An annular-grooved ring-piston, D, constructed with a raised valve-seat, *v*, and a forked stem, *i*, *c*, in combination with valve, *g*, substantially as described.”

The other material facts are sufficiently stated in the opinion of the court.

Taylor & Pollard, for complainant.

Herman & Reyburn and *Parkinson & Parkinson*, for defendant.

TREAT, District Judge.—As counsel stated that this was a test case, it is to be regretted that all the facts and circumstances were not presented free from constantly recurring exceptions on technical points as to the admissibility of evidence. It is, or should be, the purpose of the parties to have the merits of the controversy settled. The first question is as to the validity of the reissued patent, on the ground that the same was an undue expansion of the origi-

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nal. Plaintiff objected that the original had not been introduced on its part, so that the question presented could not technically be considered. The court permitted, under objections, the original to be introduced. The reasons therefor were many; without enumerating all of which, one must suffice, viz.: that it was essential for the court to be informed exactly as to the nature and extent of plaintiff's demand, in order to determine which the original of the reissue had to be before the court. An examination of the original and the reissue shows that the latter is not invalid; for it is for the same invention. Plaintiff rests his demand upon the second claim of the reissue, viz.: "The metal tube section or working barrel, B, coated with a vitreous substance and constructed with flaring ends, and receiving into said ends the lower terminus of the section, A, and the upper terminus of the lower section, B, all substantially as described." Strange to say, the same error is in the original and the reissue, to which the attention of the court was not directed by counsel, viz.: that "the upper terminus of the lower section" (there being three sections, A, B, C, respectively) should have been named B instead of C.

Treating that false description as an obvious error, the court construes plaintiff's patent to be for a metallic tube, with vitreous coating internally, each end of which is flared, so as to admit within it, from above and below, the wooden tubing with which it was to be connected. Three sections are contemplated, the upper and lower of which are wooden, and the intermediate (the one in question) metallic. To avoid "the use of bolts, screws or other fastening devices," and make the connections by "frictional contact" merely, as the patent claims, the flaring of the metallic tube at both ends became the controlling factor. There had been various contrivances before the date of this patent, more or less complicated, some by screws and some by drums or otherwise, to make the desired extensions and connections in sectional pumps. The merit of this patent, if any, was in having the

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metallic tube described inserted with flaring ends between the upper and lower sections of wood tubing, whereby, without bolts, screws, etc., the different sections would be connected by "frictional contact" solely, and the metal tube become a water chamber, in which the valved plunger could operate with attendant advantages. Inasmuch as the patent for this tube in question is all that is claimed, it is evident that its construction is essential. The patent in question is not for a combination, and what is specified as to its use is merely to indicate its adaptability to pumps, and to state its special advantages therefor. It must, therefore, be considered as designated; its peculiar feature being its two flaring ends, whereby the advantages named will be secured. It is not purposed to go into details as to the state of the art or prior patents, because it seems, in this as in many other inventions, that persons previously groped their way along the needed path, making and abandoning experiments, and falling short of the hoped-for result, while, in the light of what a subsequent inventor disclosed, it appears strange that they should not have seen what now is so clear and simple.

The patent is held to be valid, and to be for the indicated tube with flaring ends; that is, at each end. Has defendant infringed? The difficulty in the case arises under this head. The evidence on the main point is meager, viz.: Did he sell tubes with the two-fold flares, or only with one flare? It seems that, following old contrivances, metal tubes with a flare at one end only are now in use, the upper end of which is thrust into the wooden pump-stock instead of the reverse; the other end flaring to receive the lower section of the pump where needed. Before the date of the original patent metal tubes or sections were used with converging flares, so as to pass within wooden stocks reamed out for the purpose, thus forming a continuous pump or tubing where length was required. The difficulties and disadvantages appearing, plaintiff's invention of a double and divergent flaring, whereby, through frictional contact, a firm connection of the parts

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can be made, and a proper water chamber had, is simple in its terms. Must it rest, then, on its precise terms, the double flare, or be held to exclude all enameled tubes which have a flare at one end alone, designed for either interior or exterior connection with wooden pipes? The special water chamber which results from plaintiff's invention is a separate chamber between the upper and lower pipes, necessarily larger than either of said pipes. It may be that some disadvantages would result if the plunger were to be repaired, because the upper or pump-stock would have to be detached therefor. Under the prior arrangements in metal-lined pumps, when no such enlarged chamber was provided, the plunger worked freely, and could be easily removed and repaired without detaching the upper from the second part. It seems that most of the cylinders sold by defendant followed the old and well-known plan, viz., the thrusting into a pump-stock of a metallic tube in which the plunger worked freely; said tube being the water chamber.

As to said tubes with the single flare, it is held there was no infringement, and that the sale and use of the indicated metallic tubes with the double flare, or flare at both ends, did infringe plaintiff's rights.

It will thus be seen that the plaintiff's patent is held to be solely for a metallic cylinder with vitreous lining, and diverging or outward flaring at both ends; and that, as there is evidence showing that some — a few, it may be — of such cylinders were bought and sold by the defendant, a decree against him must be entered, framed according to this opinion, with an accounting accordingly, to be referred to the master, unless an agreement with respect thereto is made by the parties.

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 WILLIAMS v. LITTLE ROCK, M. R. & T. R'y and others.

(*Eastern District of Arkansas. 1883.*)

1. STATE BONDS ISSUED IN AID OF RAILROADS—ACTION BY BONA FIDE PURCHASERS—LIABILITY OF RAILROAD COMPANIES—STATUTORY LIEN.—In pursuance of an act of the general assembly of the state of Arkansas, approved July 21, 1868, entitled "An act to aid in the construction of railroads," the state of Arkansas issued certain bonds to the defendant railroad companies, the bonds were signed by the governor and countersigned by the treasurer of the state, and duly delivered to the companies, and by them sold for value. On the failure of the state to pay the semi-annual interest, this action was brought against the railroad companies to enforce the payment of the same and interest. *Held*, following *Railroad Cos. v. Schutte*, 108 U. S. 118, and *Chamberlain v. St. Paul, etc. R. Co.* 92 U. S. 299, (1) that there was nothing in the bonds themselves, without indorsement, to bind the companies that received and sold them, to pay either the principal or interest; (2) that conceding the bonds to be invalid on account of the unconstitutionality of the statute under which they were issued, as claimed by the defendants, the holders of them were nevertheless entitled to such remedy as the statute gave against the railroad companies who had accepted and sold the bonds, and had thereby ratified the remedies provided by the statute; (3) that there was nothing contained in said act which would constitute a statutory lien for the benefit of the plaintiffs, into whose hands the bonds had come, as against the property of the railroad companies.
2. SAME—TAXES NOT LIENS.—It is well settled that a tax is not a lien unless it is expressly made so by the law or ordinance which imposes it. *Heine v. Levee Com'rs*, 19 Wall. 659.

In equity.

MILLER, *Circuit Justice*.—These are two separate suits brought by the holders of bonds issued to the defendant railroad companies, or to their predecessors which had received the bonds, by the state of Arkansas. The bonds are without the indorsement of the companies, and if they are responsible for their payment, as the plaintiffs assert in their

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bills, that responsibility must arise out of some other matter connected with their acceptance and sale of them to the present holders or their privies. The bonds were in the following form:

“ *United States of America.*

“It is hereby certified that the *State of Arkansas* is indebted unto the Little Rock & Fort Smith Railroad Company, or bearer, in the sum of \$1,000, lawful money of the United States of America, redeemable in the city of New York thirty years from the date hereof, with interest at the rate of seven per cent. per annum, payable semi-annually, in the city of New York, on the first days of April and October in each year, on the presentation of the proper coupons hereto annexed. The faith and credit of the state are hereby solemnly and irrevocably pledged for the payment of the interest and the redemption of the principal of this bond, issued in pursuance of the act of the general assembly of the state of Arkansas, approved July 21, 1868, entitled ‘An act to aid in the construction of railroads;’ the said act having been submitted to, and duly ratified by, the people of the state, at the general election held November 3, 1868.”

These bonds were signed by the governor and countersigned by the treasurer of the state, duly delivered to the companies, and by them sold for value, and it may be assumed, for the purpose of this opinion, that the plaintiffs are owners or represent holders who are *bona fide* purchasers of them.

The state having failed for several years to pay the semi-annual interest, it was demanded of the railroad companies, who are defendants in these suits, who also refused to pay.

It is clear enough that there is in the bonds themselves, with no indorsement, nothing which binds the companies that received and sold them to pay either the principal or interest. If they were so bound, an action at law would be the proper remedy to enforce the obligation.

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The bills, or rather the bill (I shall in future speak in the singular, as the cases are identical), is founded on the ground of an equity arising out of the provisions of the statute referred to in the recital of the bonds as the authority for their issue, and especially an equitable lien on the road or its income, which was built mainly out of the proceeds of the sale of these bonds. Before we proceed to examine into the existence of this lien—that is, whether the statute by its language confers such a lien,—we are met by the preliminary proposition on the part of the defendants that the statute itself is void, because it is not in conformity with the provisions of the constitution of the state under which it purports to have been enacted.

The provisions relied on in support of this proposition are section 6, article 10, and section 22 of article 5, of the constitution of 1868. The first of these declares that “the credit of the state or counties shall never be loaned for any purpose without the consent of the people expressed through the ballot-box.” The second, that “no public act shall take effect or be in force until ninety days from the expiration of the session at which the same was passed, unless it is otherwise provided in the act.”

The statute under which these bonds were issued contained a declaration that it should be submitted to a vote of the people of the state, and provisions for the time when the vote should be taken, the manner of voting, and the means by which the result should be ascertained and declared. It also provides that if it appears that a majority have voted for the act, it shall immediately become operative and have full force. The twelfth section of the act, which relates to this part of the subject, is as follows:

SEC. 12. “Be it further enacted, that at the next general election to be holden under the provisions of section 3 of article 15 of the constitution of this state, the proper officers having charge of such election shall, upon a poll, as in other

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cases, take and receive the ballots of the electors qualified to vote for officers at such election for and against this act, in compliance with section 6 of article 10 of the constitution — such ballot to contain the words 'For Railroads,' or 'Against Railroads,' and if it appears that a majority so voting have voted 'For Railroads,' *this act shall immediately become operative and have full force, and all laws heretofore passed for loaning the credit of this state in aid of railroads shall cease and be void;* but if a majority shall be found to have voted 'Against Railroads,' this act shall be void and of no effect."

The vote was taken in conformity with this section, was found to be in favor of the issue of the bonds, and was so declared. But the argument against the validity of this proceeding is that the legislature had not adjourned when the popular vote was taken, and therefore the ninety days from the expiration of the session, required by the constitution, had not elapsed when the voting was done, nor did the act declare any other time when the law should go into effect. There was, therefore, no valid law which authorized the vote of the people on the subject. In my opinion, this view of the matter, though sustained by the opinion of the supreme court of the state in the case of *State v. Little Rock, M. R. & T. R. Co.* 31 Ark. 701, is erroneous. That opinion, and the argument now made in support of it, are based upon the idea that a separate statute, with all the incidents required to make it a perfect law in itself, was necessary to enable the people to vote whether this proposition should become a law or not. To me it appears plain that the *bill* is not a law until approved by the vote of a majority of the people, as the constitution required. Until then it is but a *project* for a law,—a bill which becomes a law when so approved. The constitution means this or it is without meaning. The legislature which framed this bill so understood it and acted on that view. The section copied above declares that if the

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vote is for the law, it shall then immediately be a law and go into operation; if against it, the act shall be void and of no effect. The statute, then, in describing the means by which the vote shall be ascertained, declares when it shall go into operation; fixes a time different from the ninety days from the expiration of the session, namely, the time when the vote is counted and the result is ascertained. This voting by the people is a *necessary* part of the proceeding by which this class of statutes is enacted, and they are not laws until this is done. The statute under consideration, when it thus became a law, did contain a specific designation, as required by the constitution, of a time when it should go into effect, and is not void for want of such direction. It was not a law, nor did it on its face purport to be a law, until the approval by the people was officially ascertained. When this was done, it contained a definite provision for the time when it should go into effect. I can see no want of conformity to the constitution in this respect, and this opinion is confirmed by the contemporaneous action of the governor, the commissioners appointed to determine the roads which should receive the bonds and the amount to be awarded each road, and by all the state officers who were called upon to act under the law.

It is argued, however, with much force, that the decision of this question by the supreme court of Arkansas, in the case referred to, is binding on this court, and must be accepted by the latter as the true construction of the constitution of the state, as applied to a statute of the state. Whatever may be my own personal opinion on this question, I do not think it absolutely necessary that it should be decided now; for I am bound by a decision of a similar question by the supreme court of the United States, which renders the point here taken immaterial.

The state of Florida having issued her bonds to railroad companies of the state under a statute which the supreme court of the state decided to be void for want of constitu-

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tional authority, the holders of the bonds sued the companies who had received and negotiated them, in the circuit court of the United States, as the plaintiffs in the present suit have done, to enforce the lien which that statute gave to the state as security for the payment of its own bonds. *Railroad Cos. v. Schutte*, 103 U. S. 118.

The supreme court of the United States held that, conceding the bonds to be void as against the state, the holders of them were nevertheless entitled to such lien as the statute gave against the railroad companies who had accepted and sold the bonds, and had ratified the lien provided by the statute. *Id.* 129.

Accepting the doctrine of that case as applicable to this, the remaining question is whether any lien which a court of equity can enforce against these railroad companies or their property or income can be implied from the act of 1868, or arises out of the circumstances of the case. This act, by its first section, authorized the issue to each railroad company of the state, which should become entitled thereto, of the bonds of the state, to the amount of \$15,000 per mile, where there had been no land grant from the United States, and \$10,000 per mile where such grant had been received. By other sections the board of railroad commissioners, a body then in existence, was authorized to ascertain and report to the governor what companies were entitled to receive these bonds, and how many of such bonds at \$1,000 each should be issued to the companies applying for them according to rules prescribed by the statute. The obligations which the statute imposes on these companies are found in the sixth, seventh and eighth sections of it. The first of these declares "that the bonds or the avails of them shall be disposed of solely for the purpose of providing for the ironing, equipping, building and completing said roads."

As the plaintiff's claim rests mainly here on the provisions in the seventh and eighth sections of the act, they are here copied in full:

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"Sec. 7. Be it further enacted, that the legislature shall, from time to time, impose upon each railroad company to which bonds shall have been issued, a tax equal to the amount of the annual interest upon such bonds then outstanding and unpaid, which tax may be paid in money or in the past-due coupons of the state at par, and, after expiration of five years from the completion of said road, the legislature shall impose an additional special tax of two and one-half per cent. per annum upon the whole amount of state aid granted to such company, payable in money or in bonds and coupons of the state at par; and, if in money, the same shall be invested by the treasurer of the state in the bonds of the state, at their current market value. The taxation in this section provided to continue until the amount of bonds issued to such company, with interest thereon, shall have been paid by said company as herein specified, in which case the said road shall be entitled to a discharge from all claims or liens on the part of the state: provided, that nothing herein contained shall be so construed as to deprive any company securing a loan of the bonds of the state herein provided for from paying the whole amount due from such company to the state at any time in the bonds of the state loaned in aid of railroads, or the coupons thereon, or in money."

"Sec. 8. Be it further enacted, that in the case said company shall fail to pay the taxes imposed by the preceding section, at the time the same become due, and for sixty days thereafter, it shall be the duty of the treasurer of the state, by writ of sequestration, to seize and take possession of the income and revenues of said company, until the amount of said default shall be fully paid up and satisfied, with costs of sequestration, after which said treasurer shall release the further revenues of said company to its proper officers."

The proposition of complainants is that these sections are in the nature of a statutory lien on the property of the railroad companies which received the bonds, for the security of the payment of these bonds, and that this lien inures to the

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benefit of any bondholder into whose hands they may come. This proposition naturally divides itself into two, namely: (1) Does the statute create a lien in favor of the state? (2) If it does, is it a lien which follows the bonds of the state into the hands of subsequent holders after they had been delivered to the companies?

I confess that but for the use of the word "lien," I see nothing in the power here conferred upon the legislature in the nature of a lien. The power is "to impose a *tax* upon the railroad company" sufficient, at first, to pay the interest accruing annually upon the bonds received from the state, and, after five years from the road's completion, an additional annual tax of two and a half per cent. on the amount of the bonds, to be paid to the state. This tax is not made a lien on the property of the railroad companies by any express language. It is well settled that taxes are not liens unless they are expressly made so by the law or ordinance which imposes them. *Heine v. Leves Com'rs*, 19 Wall. 659; 2 Dill. Mun. Corp. 655.

The remedy given by the eighth section to enforce the collection of this tax repels the idea that the tax is a lien on the road, its franchises, or any other tangible property of the company, for it is limited to the sequestration of the *income and revenues* of the company until the amount of the default shall be paid. If there be any lien at all, it is confined to the income and revenues of the company, and does not extend to its road-bed, track, locomotives, or any other visible property. This is made still plainer by the guarded language, which, even for the purpose of securing or appropriating this income and revenue to the payment of the debt or its interest, does not authorize taking possession of the road or its rolling stock, nor the operation of the road to produce income, but simply that the treasurer of the state may, by a writ of sequestration, "seize and take possession of the *income and revenues* of the company," until the amount in arrears is paid. There is here no declaration of

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a lien on any property of the company, nor any authority to seize it or to sell it, or to proceed against it in any way to enforce the payment of the debt. The remedy given implies that there is to be no other. If, then, there is a lien, it covers only the income or other revenue of the company, if any such there be.

If the word "lien" were not in the statute, I think no one would infer a lien on anything from the nature of the transaction as it is described in the act. Without the use of that word it is simply an authority to the legislature of the state to provide for the payment by these companies to the state of the money which it will have to pay on its bonds issued for their benefit. This is to be done by what the statute calls a *tax* on the company, but it is no more a tax, in its essential character, though called so, than it is a lien, though that word is used. The matter is simply a power in the legislature to assess or determine, from time to time, the sum which each company is required to pay to save the state harmless in regard to the bonds it has received, and a direction to the treasurer to collect this assessment by sequestering the income of the company to the extent which may produce this amount. The tax is not even to be assessed or levied on the property of the company. It has no relation, in its amount, to the value of the company's property, but solely to the amount of its obligation to the state. It would be difficult to find any definition of the word "lien" adapted to this transaction. The manner in which the word "lien" is introduced into the statute shows that it was not used in any clear or accurate sense, for it is a simple declaration that, when the amount of the bonds issued to any company shall be paid to the state, either in money or in any of the state's bonds, the taxation shall cease, and "the said road shall be entitled to a discharge from all claims or liens on the part of the state." These words were used, undoubtedly, out of abundant caution, and there could have been no thought in the minds of the legislature that,

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by the use of this word in connection with the word "claim," they were *establishing* a lien not already created by the statute. But it is not a lien, because the right conferred, whatever its nature, could only be exercised by some act of the legislature imposing the tax. If the legislature failed or neglected to ascertain the sum which each company should pay, and fix the time at which it should be payable, there was no obligation, no fixed right, to enforce, and therefore no lien. But the year after the passing of the act of 1868, to wit, April 10, 1869, the legislature passed a statute to levy and enforce the collection of this tax. By its first section the auditor of public accounts was required, on or before the first day of June and December, to certify to the treasurer the amount which the state will have to pay for interest on the bonds issued to each railroad company, and the treasurer was to notify the companies. If the companies, or any of them, neglected to pay, the Pulaski chancery court was to issue the writ of sequestration provided for in the act of 1868, and appoint a receiver to execute it. This he was to do by taking possession of all the incomes and revenues of the defaulting company, with authority to demand and receive all moneys coming to the same from the operation of said road, and it is made the duty of all the officers of said company to return all moneys to him. It also provides that only the net proceeds or surplus, after the necessary costs of operating said road, shall be applied in discharge of the tax due and unpaid.

That this was the true construction of the act of 1868 is made clear by a comparison with the previous legislation of the state on the same subject; for this was not the first statute passed to aid by a loan of its credits in building roads within its border. A statute of the previous year, approved March 18, 1867, had authorized the issue of bonds to the extent of \$10,000 per mile to any company which had prepared forty miles of its road-bed to receive the rails, and the bonds were only to be issued in that proportion as fast as

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the track was so prepared. The fifth section of that act in the strongest terms declared that these bonds should constitute a lien — *a mortgage lien* — on all the property, rights and credits of the company receiving them, paramount to all other debts, contracts and liabilities of said road. This purpose is thus expressed:

“Sec. 5. Be it further enacted, that the receipt of any railroad company, for the bonds loaned to it by the state, shall immediately operate as a lien on the road, its rights, franchises and all its property of every description, real and personal; and this lien shall be a mortgage on all the property, rights and credits of the road, and shall have priority over any and all other debts, contracts and liabilities of said road; and said mortgage shall continue until the entire amount loaned to the said road by the state shall have been paid off.”

Subsequent sections of the act make provision for the enforcement of this lien by seizure, by the governor, of the road and other property of the company, by appropriating the income to the payment of the interest, and to the creation of a sinking fund to pay the principal, and finally, if necessary, by an absolute sale of all the property thus pledged to secure the state. The existence of these stringent provisions in the act of 1867, which are all left out of the act of 1868, which latter act expressly repeals the former, and the contained limitation of the remedy to an appropriation of the net income of the company, can leave no doubt that the other property of the company was not to be subjected to any lien for the payment of the bonds issued by the new law. Under this law of 1869, which is the practical interpretation of the legislature of its power under the act of 1868, only the surplus income or net profits arising from the operation of the road could be subjected to the payment of such tax as the legislature might impose for its payment. The state, therefore, if it had paid punctually the interest on the bonds, according to the promise which they bear on their face, and ac-

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ording to the pledge of its faith contained in the act of 1868, could only assert a right to receive such surplus revenue or net income as might arise from the operations of the road of the company in default, after paying the necessary operating expenses of the road. There is in the bill of complaint in these cases no allegation that there is any such surplus income, or any other revenue of the companies, or of either of them, which can be seized under the writ of sequestration, if one were issued by the treasurer or by the chancery court of Pulaski county, under the act of April 10, 1869. But this act of 1869 was repealed in express terms by the legislature by act of May 29, 1874, and the special proceeding pointed out for the state by act of 1869 no longer exists as a remedy. Supposing, however, that this appeal left the state to such remedy as can be found in the original act of 1868, and that this court can be called on to administer the equity of that act, it remains true that until it is shown that there is some revenue of the defaulting company to which the court can resort, or some net income of the company beyond the current expenses of operating the road, which the court could appropriate to the satisfaction of complainants' claims, the court would be without power in the premises. There was no power in the state to seize the road or to operate it, or to take any of the tangible property of the company for that purpose. There can, therefore, be none in the court, for the court can only enforce such right as the statute gave the state. It is further to be observed that the whole theory of the bill in this case, and of the remedy sought by it at the hands of the court, is founded on the idea that there is a lien in favor of the holders of these bonds, prior to all other liens, on the road itself and its running stock, which may be subjected to sale for the satisfaction of the debt of the plaintiffs against the state of Arkansas.

I have thus far discussed the questions at issue as though the holders of these bonds are entitled to be subrogated to

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all the equities, whether they amount to a lien or not, which the state of Arkansas might have had against the companies which originally received these bonds.

It remains to be considered how far the security which the statute gave the state of Arkansas against loss on account of the bonds she might issue to the companies can be made available in a court of equity against the present owners of the roads to aid in building which the bonds were issued, in favor of the present holders of these bonds. Three adjudged cases are cited by counsel, and much insisted on in the argument, as precisely covering this case. The first of these which I shall notice is the case of *Hand v. S. & C. R. Co.* 12 S. C. 314. In that case the lien given by the statute was in express terms to secure the payment of the bonds. The act provided for bonds of the railroad companies, which were to be indorsed by the state and delivered to the company. The statute of South Carolina is as follows:

"That as soon as any such bonds shall have been indorsed, as aforesaid, for the first section of the road, as aforesaid, they shall constitute a lien upon such section, so prepared, as aforesaid, including the road-bed, right of way, grading, bridges, and masonry," etc., "and upon said iron rails, spikes, and equipments, when purchased, and the state of South Carolina, upon the indorsing of the said bonds, and by virtue of the same, shall be invested with said lien or mortgage, without a deed from the company, for the payment by said company of said bonds, with the interest thereon as the same becomes due."

It was contended by the railroad company, in the suit before the state court by bondholders to enforce this lien, that it inured to the benefit of no one but the state, and did not follow the bonds so indorsed into the hands of subsequent holders.

To this the court made the following reply:

"We are required to say that the vesting of the lien in the state means that the state shall have it exclusively, not-

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withstanding other portions of the same section of the act indicate an intent that it shall inure to the benefit of the bondholder. That portion of the section which vests the lien in the state sets forth the objects for which the lien was created and vested, namely, a security for the payment of the bonds and interest."

If the statute in the present case had made as clear a declaration of a lien on the property of the company, and that the *bonds* themselves constituted the lien, there would be no difficulty in holding—at least there would be none to me—that the existence of this lien was co-extensive with the existence of the bonds, in whose hands soever they might be found, until they and the lien were both extinguished by payment or some other form of satisfaction.

So in the case of *Railroad Cos. v. Schutte*, 103 U. S. 118. In that case the state of Florida had, by a statute, provided for the issue and delivery by the state of her bonds to certain railroad companies. The statute required before this should be done that the railroad companies should deliver to the state its own bonds of corresponding character, principal and interest payable at the same time the state bonds were. The statute also declared that these company bonds should be a first mortgage lien on all the property of the company which issued them, and should be held by the state as security for the payment by the company of the bonds of the state. Not only did the statute make this provision, but on the face of every bond of the state issued under this law, there was the following indorsement:

"This bond is one of a series issued in aid of the" (railroad company, naming it) "to the extent of \$16,000 per mile upon completed road; the state of Florida holding the first mortgage bonds of said railroad company for a like amount, *as further secured to the holder thereof.*

"HARRISON REED, Governor of Florida."

The supreme court, in holding the companies liable to the

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holders of the state bonds, speaking of the transaction, says:

"It is clear, therefore, the intention was that, as between the state and the company, the state was to be the guarantor of the company's bond and the principal debtor. With the public, however, it was different. There the state was the debtor, and the company was only known through the statutes under which the bonds were put out, and the certificates indorsed on the bonds themselves, which were that the state held 'the first mortgage bonds of the railroad company for a like amount as security to the holder thereof.' Such bonds of the state, with such indorsements, the company put on the market and sold. Under these circumstances the certificate of the governor, as to the security held by the state, is, in legal effect, the certificate of the company itself, and equivalent to an engagement on the part of the company that the bond, so far as the security is concerned, is the valid obligation of the state. The case is clearly within the reason of the rule which makes every indorser of commercial paper the guarantor of the genuineness and validity of the instrument he indorses."

Again the court says:

"In our opinion there is no occasion for applying here the doctrines of subrogation, because in unmistakable language the statute has made the mortgage of the company security for the obligations of the state."

No such language can be applied to the act of 1868 of the Arkansas legislature. No indorsement whatever is made on the bonds of the state; no reference to any security held by the state is found in the bonds on which this suit is brought, nor in the negotiation of their sale.

The state, as is said in the case of *Railroad Cos. v. Schutte*, is the primary debtor, and to the state alone must the holders of her bonds look for payment, unless the statute gave a lien on the property of the railroad company, which follows the bond into the hands of every purchaser. The circum-

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stances which gave the holder this right in the South Carolina case and in the Florida case, and which, in the opinion of the courts in those cases, were relied on as for that proposition, do not exist in the case before us.

The case of *Ketchum v. St. Louis*, 101 U. S. 306, is a complicated one, differing in many respects from this case. The county of St. Louis, under authority of an act of the legislature of Missouri, issued to the Pacific Railroad of Missouri her bonds for \$700,000, and the railroad company agreed to pay out of its earnings \$1,000 per month to the county until the principal and interest of the county bonds were paid. The city of St. Louis, which, by an act of the legislature, had superseded the county as a municipal corporation, brought this suit to enforce that agreement.

It will be observed here that it is not the holders of the bonds of the county who bring the suit, but the city itself, the original party to the transaction, and to whom it is asserted the lien was given. The case, therefore, does not bear on the question of a transfer of the lien or security to the purchasers of the bonds.

The court below, and the supreme court, decide that the act of the Missouri legislature, under which the county issued her bonds to the company, *and the agreements made at the time, gave to the county a right paramount to every existing debt or obligation of the company to these earnings.* The state could make such a valid declaration, for it was at the time holder of the only prior mortgage of the company, and thus waived this priority. Under the law as it then stood there was a fund commissioner, whose duty it was, when the company was in default, to receive these earnings, and dispose of them as they were directed.

The new statute declares that this officer, "*or such person as may at any time hereafter have the custody of the funds of said railroad company*, shall, every month after said bonds are issued, pay into the county treasury of St. Louis county, out of the earnings of said Pacific Railroad," \$1,000 per

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month, and \$1,000 additional in each month of December, to meet the interest on said bonds until said bonds are paid off by the Pacific Railroad.

The supreme court declared that this contract could be specifically enforced against a receiver of the road operating it under an order of the court, and against a purchaser under a foreclosure of the state's mortgage.

If the case before us were a bill on the part of the state which was paying the bonds it had issued to the company, a specific contract of the company to pay a specific sum out of its net earnings per month, there might be some analogy; but the cases are in many respects so different, that, though there may be some analogy, I do not think the one governs the other. None of these cases, therefore, support that of complainants here. Nor does the doctrine apply that a creditor has the right to claim the benefit of a security given by his debtor to his surety for the latter's indemnity, for the state here is the principal debtor, and not the surety, as held by the supreme court in *Railroad Cos. v. Schutte, supra*, and in *Chamberlain v. St. Paul, etc. R. Co.* 92 U. S. 299. In this latter case the true doctrine governing the present case is laid down. An act of congress having donated lands to aid railroad companies in Minnesota in constructing their roads, the state also issued to one of these companies her bonds under a statute somewhat analogous to the Arkansas statute. In the Minnesota case, however, these government lands and the net profits of the road were pledged to the state as a security against loss, both by the statute and by a mortgage and bonds. All this was done, and Chamberlain, the plaintiff, received \$100,000 of these bonds of the state for work in construction of the road. The railroad company became insolvent; the state purchased the road and the lands under her mortgage, but never paid her own bonds. The suit was an attempt by Chamberlain, in a chancery court, to enforce the lien of the state for his own benefit. The supreme court said:

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"The general doctrine that a creditor has a right to claim the benefit of a security given by his debtor to his surety for the latter's indemnity, and which may be used, if necessary, for the payment of the debt, is not questioned. The security in such cases is in the nature of trust property, and the right of the creditor arises from the natural justice of allowing him to have applied to the discharge of his demand the property deposited with the surety for that purpose, if required by the default of the principal. In this case the deed and mortgage to the state were not intended to create a trust in favor of the holder of the bonds. The state was primarily liable to the bondholders, and it was only as between her and the company that the relation of principal and surety existed." 92 U. S. 306.

That the right of the state to levy a tax on the railroad companies was, in the language just quoted, "not intended to create a trust in favor of the bondholders," is manifest from the provision that the companies could discharge themselves from all liabilities by payment of the amount of the state bonds into the state treasury at any time it suited their convenience, without regard to the time when the bonds fell due, or to the rate of interest they bore. It is important to observe, also, that this could be done by making payment in any of the railroad bonds of the state, so that one of these defaulting companies, by buying at a discount bonds of the state issued to other companies, could discharge themselves of the lien which it is now asserted exists as security for the bonds which they had received and issued, without redeeming a single one of their bonds or paying a dollar in satisfaction of their principal or interest. These bondholders, in such an event, would be left just where they are now, with their sole reliance on the faith and credit of the state, which, in my opinion, is all they ever had or bargained for when they took the bonds, and which is all the statute or the nature of the transaction was intended to give them.

I have thus far said nothing about the *status* of the de-

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fendants as innocent purchasers of the property of the original company, which is the position asserted for one of them, and of the fact that under subsequent mortgages there are bondholders whose right to the property of the company and to an appropriation of their income is superior to that of complainants. But if I do not go into this question, it is not because it is unworthy of consideration, but because I am of opinion that no lien in favor of the holders of the state bonds was created by the acts of the Arkansas legislature, and if such a lien can possibly be inferred in favor of the state, it does not pass to the creditors of the state, either by anything found in the statute itself, or by any recognized principle of law.

I am of the opinion, therefore, that the bills in these cases should be dismissed.

John McClure and John R. Dos Passos, for plaintiffs.

John F. Dillon and C. W. Huntington, for defendants.

UNITED STATES v. YODER.

(*District of Minnesota. November, 1883.*)

1. ACTION OF TROVER—RIGHT OF SETTLERS TO CUT TIMBER AND IMPROVE LAND BEFORE PRE-EMPTION.—A settler, claiming in good faith a homestead, can, for the purpose of improving the land, cut down the necessary timber before he files his entry in the land office. There is nothing in the homestead act requiring an entry in the land office before settlement.

This is an action of trover for the conversion of timber owned by the plaintiffs.

ADMITTED FACTS.

In April, 1880, Hermann E. Robinson, the defendant's vendor, settled upon the surveyed land upon which the tim-

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ber was cut, with a view of making it his homestead, and in October, 1881, he made his entry at the proper land office. In January, February and March, 1881, for the purpose of improving the land, he cut thereon one hundred and ten thousand feet of pine logs and sold the same to the defendant, delivering them at his saw-mill. Robinson, the settler, has resided upon the land from the time of his settlement up to the trial of this cause, except when absent temporarily for a few months.

Mr. Congdon, Assistant United States Attorney, for plaintiff.

O'Brien & Wilson, for defendant.

NELSON, *District Judge*.—The government has no right to the logs or their value upon the facts above stated. It may be true that in pre-emption cases the government can dispose of the land by grant for public purposes, or reserve it from sale, before all the prerequisites for obtaining the title have been complied with by the settler; still, in this case, the government has not done so, and the authorities cited by the district attorney have no application to the existing facts. The naked question presented is whether or not a settler, claiming in good faith a homestead, can, for the purpose of improving the land, cut down the necessary timber before he files his entry in the land office. I find nothing in the homestead act forbidding it; and if the settler is acting in good faith, the fact that the time above specified intervened between the settlement and filing of the entry would not prevent him from doing, in the meanwhile, that which good husbandry would dictate. There is nothing in the act requiring an entry should be made in the land office before settlement. Chapter 89, § 3, Supp. Rev. St. p. 526; *Johnson v. Towsley*, 13 Wall. 90. A person who has filed a pre-emption claim, and become entitled to the law governing pre-emptors, may avail himself of the homestead act, and

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certainly he must have settled and improved the land before he makes his pre-emption claim. In my opinion, this law, so wise and beneficial in its results, should be liberally construed, and unless there is evidence of bad faith on the part of the settler, it is not the policy of the government to harass him by vexatious litigation.

Judgment for defendant.

MENTZER v. ARMOUR and others.

(*Western District of Missouri. October, 1883.*)

1. **PERSONAL INJURY — NEGLIGENCE — BURDEN OF PROOF.**—The law does not presume or impute carelessness or negligence, but requires it to be shown by him who alleges it, and unless he does show it he cannot recover.
2. **SAME — CARPENTERS — RISKS ATTENDING THE TRADE.**—A carpenter engaging himself as such is bound to know, and he assumes, the ordinary dangers of his calling, and must exercise prudence and caution accordingly.
3. **SAME — OVERSEERS — CARE IN SELECTING.**—In employing overseers or superintendents ordinary care and prudence must be used in ascertaining their qualifications and fitness; but the law presumes that self-interest is a sufficient stimulant in the ascertainment of the suitability of an overseer, and therefore the burden of proof is with him who alleges the unfitness.
4. **SAME — SETTLEMENTS OF CLAIMS FOR DAMAGES.**—The law favors settlements between those claiming damages for personal injuries and those who may be the cause of the same; but if such settlements are induced by false representations, or when the injured party is not in possession of his proper senses, they must be regarded as a nullity.

At law.

KREKEL, *District Judge (charging jury).*—This suit is brought by Mentzer, plaintiff, to recover damages from Armour and others, defendants, for personal injury sustained while in their employ as a carpenter upon a building which defendants were erecting in Kansas City. In the statement

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of his cause of action Mentzer alleges generally that his injury resulted from defendants failing to furnish proper material for the construction of the building; failing to furnish a safe and proper structure for him to stand and walk on; failing to furnish efficient and sufficient superintendents; charging that the defendants wholly disregarded their duty in these respects, carelessly and negligently furnishing unsound and defective lumber for joists; that defendants' agents carelessly and negligently nailed and fastened the joists; that they carelessly and negligently furnished unskilled and incompetent superintendents,—all of which the defendants knew, or might have known by the exercise of ordinary care; that this carelessness and neglect caused dangers of which they failed to advise him; that defendants' overseer ordered him to go upon said joists to brace them, which he did, and was thereby permanently injured and disabled, to his damages in the sum of \$1,500. The defendants in their answer generally deny all carelessness and neglect; deny that the material used in the building was unsound or otherwise defective; and say that the injury plaintiff received was the result of his own carelessness and neglect, and that they are therefore not liable to him. They further set up a release, whereby any claim for damages which plaintiff might have had was discharged.

You observe that the complaint of the plaintiff proceeds upon the ground that defendants were bound to furnish suitable material for building purposes, and place the same in proper position for his work; that the defendants did not furnish efficient superintendents, in consequence of which neglect by the defendants the plaintiff was injured. In the consideration of the case you will bear in mind that the allegations of carelessness and neglect made by the plaintiff he is bound to prove by a preponderance of evidence. The law does not presume or impute carelessness or negligence, but requires it to be shown by him who alleges it, and unless he does show it he cannot recover.

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And, *first*, as to the defense set up that defendants have been released from any damages to which the plaintiff may have been entitled. The execution of the release in evidence is not denied. Regarding this release it may be said that the law favors settlements of the kind. A defendant may buy his peace. The plaintiff says he ought not to be bound by it, because the release was obtained from him by fraudulent misrepresentations made by defendants' agents, and that he was not in his right mind when he executed it; that when it was obtained he was suffering from pain, and was under the influence of drugs, and did not know what he was doing. The allegations as to the fraudulent obtaining of the release, and the state of his mind at the time of executing it, made by the plaintiff, must be proven by him. If you are satisfied from the evidence that the release in question was obtained by fraudulent representations, or that from any cause plaintiff was not in his right mind when he executed the same, he ought not to be bound by it, and it should be treated by you as a nullity. The release is valid as it stands, and unless successfully attacked as stated, ends the case, and your verdict should be for the defendants.

As I cannot and have no right to anticipate the result of this branch of the case, I proceed to instruct you upon the remaining issue — that of carelessness and negligence on the part of the defendants. And here, *first*, of the suitability of the timber. The modern tendency is to grade all property entering into commerce as far as possible, so that the knowledge of the grade of an article enables any one to fix, for the time being, its market value. Lumber, it seems, has measurably been brought within this tendency. Thus, according to the evidence, we have a first, second and third grade in clear; and first, second, and culls in lumber not clear. In 1879, the time the defendant built the structure in which the plaintiff was injured, there were only two grades in lumber not clear, namely, first grade and culls. It may be taken to be conceded that first-class lumber (not

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clear) is not only suitable, but almost universally used for joists; but it is claimed that the first class of lumber last spoken of contains a certain percentage of lumber unfit for use, and that this unfit lumber must be ascertained by inspection and thrown out before use can be made of first-class lumber with safety. Whether this claim by plaintiff is well made and supported by the evidence you must determine. Defendants say that the inspection here spoken of, whether required or not, did in fact take place, under the order of the superintendents, and by the carpenters who prepared and fitted the joists for laying. It is for you to say, under the evidence, whether the purchasing of graded lumber in the market, and the manner in which the lumber was inspected afterwards by the defendants before the same was put in the building, constituted usual and ordinary care, so as to release the defendants from the charge of carelessness and negligence regarding the timber used. If you shall come to the conclusion that what was done in the way of inspection of the lumber used in defendants' building constituted usual and ordinary care, in that case the defendants are not liable, though a defective joist may have gone in the building, and have been the cause of or contributed to the injury of the plaintiff. If you arrive at the conclusion that what was done in the way of inspection of the lumber used by defendants did not constitute usual and ordinary care, and that a defective joist went into the building, which was the cause of his injury, the defendants would be liable, under the limitations to which I shall hereafter call your attention.

Regarding overseers or superintendents, you are instructed that in employing them ordinary care and prudence must be used for the ascertainment of their qualifications and fitness. The law presumes that self-interest is a sufficient stimulant in the ascertainment of the suitability of an overseer or superintendent, and therefore you must take it that the overseers or superintendents employed by defendants were

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qualified for their position, and the plaintiff is bound to show their unfitness, and that defendants knew of such unfitness, or might have known thereof by using ordinary care, and that thus having the actual or imputed knowledge they still retained the unfit person. But not only must you be satisfied that defendants' overseer or superintendents were unfit for their positions, and that the defendants knew it, but you must be further satisfied that their unfitness caused or directly contributed to the injury of the plaintiff.

The plaintiff, under the evidence in this case, had himself certain obligations to discharge, to which I proceed to call your attention. The law is that a carpenter, engaging himself as such, is bound to know, and he assumes, the ordinary dangers of his calling, and must exercise prudence and caution accordingly. Thus, when the overseer or superintendent of the defendant ordered plaintiff to go upon the fourth floor of the building to brace joists, he was bound to see when he went to work whether the joists were in a condition to be braced. The overseer, in sending plaintiff to do work with which he is presumptively familiar, had a right to assume that the plaintiff would exercise ordinary care and prudence in seeing that work upon which he was entering was in safe condition. Plaintiff, with this presumed knowledge of how the laying and bracing of joists is done, was bound to see that the joists were in their designated places, and that they were in the condition in the way of toe-nailing, if such was necessary for safety, for the purpose of bracing, before he undertook to brace them. If plaintiff failed or neglected to use this precaution, and such failure caused or contributed to his injury, he cannot recover, he being in fault. If you shall find from the testimony that the plaintiff walked from the foot-board on the joist, and that such proceeding was an imprudent or reckless act, and the injury resulted therefrom, he cannot recover, because of his being in fault himself.

The meaning and intent of what has been said regarding

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plaintiff's obligation amounts, in short, to this: that a carpenter, when sent upon work within the scope of a carpenter's usual knowledge, the presumption is that he possesses such knowledge, and that he will use it in the way of accomplishing the object of the work in which he is engaged with due care to the interest of his employer, and with a view to his own safety. If he fails to exercise the caution here spoken of, he does it at his own peril, and has no one to blame but himself if he is injured in consequence. No notice of common danger pertaining to the occupation need be given. He is supposed to know them, and assumes the risk in the employment,

The matters upon which you have to pass may be summed up as follows:

The release in evidence will entitle the defendants to a verdict in their favor, unless the same was obtained by misrepresentations, or the plaintiff, at the time of executing the same, was in a state of mind unfitting him from entering into the contract. If the release was obtained by misrepresentations or when the plaintiff was not in his right mind, in either case it should be treated as a nullity. The joist causing the injury, if inspected according to the instructions given you in that regard, is to be taken as fit and suitable to be used in defendants' building; and if injury resulted from its use to plaintiff, defendants are not responsible therefor. If the joist, whether inspected or not, has been proven to your satisfaction to have been fit for the use to which it was put, the defendants are not responsible for the injury which may have resulted therefrom to the plaintiff. If the joist was not inspected as required by the instructions given you, and you are further satisfied from the evidence that the same was unfit for the use to which it was put, and that plaintiff himself, using the precaution and care which his profession and employment imposed on him, was, notwithstanding, injured in consequence of the unfitness of the joist, he is entitled to recover, and the verdict should be for

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him. Though you may find from the evidence that the joist in question was not properly inspected, and was not fit to be used in the building of defendants, yet if plaintiff contributed to his injury by imprudence or recklessness, without which the accident would not have happened, this constituted contributory negligence, and the plaintiff cannot recover, and the verdict should be for the defendant. Though you may find from the testimony that the superintendent or overseer ordering plaintiff to proceed to brace the joists was an unfit person for his position, this did not relieve the plaintiff from using the ordinary prudence and care heretofore spoken of.

There is no controversy about the safety of the structure erected by defendants as a whole, and therefore no mention has been made thereof in the instructions, though set up in plaintiff's declaration.

The rule of assessing damages, in case you find the issues for the plaintiff, is as follows: The difference between his former and his present ability to earn, including compensation for his past suffering.

Scott & Taylor, for complainant.

Pratt, Brumback & Ferry, for defendants.

LYNCH and others v. MERCANTILE TRUST Co.

(*District of Minnesota, November, 1883.*)

1. FRAUDULENT MISREPRESENTATIONS — RECKLESS STATEMENTS. — A person is not at liberty to make positive assertions about facts material to a transaction, unless he knows them to be true; and if a statement so made is in fact false, the assertor cannot relieve himself from the imputation of fraud by pleading ignorance, but must respond in damages to any one who has sustained loss by acting in reasonable reliance upon such assertion.

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2. **SAME — WHAT INQUIRIES MUST BE MADE.**— The purchaser of land is entitled to rely upon the vendor's assertions about the boundaries, and is not obliged to consult the recorded plat.
3. **SAME — PRINCIPAL AND AGENT — IMPUTED FRAUD.**— A principal is liable for the reckless or otherwise fraudulent misrepresentations of his agent.
4. **SAME — VENDOR CANNOT REPUDIATE CONTRACT.**— A purchaser is entitled to the benefit of his contract, and the vendor cannot purge himself of fraud in the transaction by offering to rescind, but is liable for the difference between the value of the property actually sold and the value of the property as represented.

A stipulation waiving a jury is filed, and the case is tried by the court. This suit is brought to recover damages for fraudulent representations, alleged to be made by the defendant's agent to one of the plaintiffs, upon the sale of a certain tract of land called "E. Murphy's reserved block," in the city of Minneapolis, owned by defendant, and sold for \$15,000. The plaintiffs, being desirous of purchasing a house and lot for a hospital, applied, through Alicia Lynch, to Brown & Hamlin, real estate brokers and agents in Minneapolis. They had for sale, belonging to the defendant, "E. Murphy's reserved block," so called, on which was a large house, and application was made for its purchase. Mr. Brown went with the applicant and showed the property, pointing out the boundaries, and stated that this block included all the land lying between certain fences, as pointed out on three sides, and extending to the river, and that the frontage on Fifth (now Jackson) street was six hundred feet from fence to fence, and three hundred feet deep, or to the river. The applicant subsequently measured the lot pointed out and described by the agent, and found the frontage to be six hundred feet, and, relying upon the representations of Brown, the plaintiffs concluded the purchase, took possession, and made improvements.

These representations were false, and the true boundary of the tract was only four hundred and seventy feet frontage, and all the land pointed out between the fences did not

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belong to the defendant. Brown had no actual knowledge of the size of the block, and supposed it included all the land within the fences. The contract of sale was drawn up in Brown & Hamlin's office, sent to the proper person to execute, and subsequently the defendant ratified Brown's sale, and received the benefits thereof. When the defendant discovered that the representations were false, and the boundaries incorrectly pointed out, and after the plaintiffs had received the deed and made improvements, it offered to rescind the sale, and pay back the part of the purchase price received, which was declined, and on failure to pay for the alleged injury suit was brought.

Babcock & Davis, for plaintiffs.

Bigelow, Flandrau & Squires, for defendant.

NELSON, *District Judge*.—It is necessary for the plaintiffs to prove that the false representations made were material, and were relied on and operated as one of the inducements to the purchase, before entitled to a judgment. Fraud, as well as false representations, must clearly appear, and there must exist positive statements of material facts as true,—false affirmation of facts which were relied on and induced the plaintiffs to purchase. The rule is thus expressed by Maule, J., in *Evans v. Edmonds*, 13 C. B. 777, 786:

“I conceive that if a man having no knowledge whatsoever on the subject takes upon himself to represent a certain state of facts to exist, he does so at his peril; and if it be done either with a view to secure some benefit to himself or to deceive a third person, he is in law guilty of a fraud, for he takes upon himself to warrant his own belief to the truth of that which he so asserts.”

Or, as stated in *Ainslie v. Medlycott*, 9 Ves. 21:

“If, without knowing that it is true, he takes upon himself to make a representation to another, upon the faith of

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which that other acts, no doubt he is bound, though his mistake was perfectly innocent."

So, in *Brooks v. Hamilton*, 15 Minn. 31 (Gil. 10):

"To constitute a fraudulent representation, the party making the representation must represent that as true of his own knowledge which is not true, but as to the truth or falsity of which he has no knowledge, or must represent that as true which is false, and the truth or falsity of which he is presumed to know."

The owner of property, when he sells, is presumed to know whether the representation which he makes about it is true or false; and the positive statement thus made of a material fact, if false, is a fraud in law. A purchaser trusts in the owner's statements, and the law will assume that the owner knows his own property and truly represents it. So if an injury results from the statement of a material fact which influences the sale, and not from the statement of the opinion or belief of the vendor, an action will lie if the representation is false, and it is not material whether the vendor knew to be false what was stated. If the representation as to a material point was relied on, and was stated as a fact, intended to convey the impression that the party had actual knowledge, the vendor cannot plead ignorance as an excuse if the statement was false.

In this case the representations by the agent were positive of a fact presumed to be within the knowledge of the defendant and his agent. The defendant must bear the burden of the negotiation, or any liability growing out of any false statements accompanying it and material to the sale. It not only placed the property in Brown & Hamlin's hands for sale, but ratified their acts and received the money paid according to the terms of the contract. Its liability for the agent's acts in making the negotiations is thus established. The principal is bound by the fraud of his agent. The statements of Brown when he went down and pointed out the property tended to throw the purchaser off her guard and

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render an examination of the land less perfect, and the purchaser was not required to make any further examination than was done. The plaintiffs were not bound to consult the plat. *Porter v. Fletcher*, 25 Minn. 493.

When the agent made his statements these acts imported knowledge of the facts by him. The representations made by Brown are conceded, and the falsity of them; but their materiality, and, if material, the liability of the defendant, is persistently denied. There is no doubt the representations are material, and tended to induce the trade. The agent made them, not according to his opinion and belief, but as of his own knowledge. Such averments are positive to material points affecting the sale; for quantity and location are material elements, and always taken into consideration when real estate is sold, and, if statements regarding them are untrue, constitute fraud.

The defendants urge — *First*, that the sale was made with reference to the records of the office of register of deeds of Hennepin county, where the plat of the property was recorded, upon which its location and size and boundaries are all distinctly marked, and the parties to the sale are bound thereby; *second*, that the representation was innocent, founded in ignorance and mistake, and no action will lie. There is no evidence to sustain the first defense, and the recorded plat did not disclose upon its face the size of the block. In regard to the second defense, the rule is well settled that to state what is not known to be true, whereby injury results to another, is as criminal as to state what is known to be false; and it is reasonable to presume that the defendant or its agent, who knew how the property was obtained and placed in the market for sale, would have the boundaries of the land correctly described, and could be trusted in representing that the land sold was included within the fences pointed out to the plaintiff, and under such circumstances the false statement is of a matter supposed to be within defendant's knowledge, and imparted to

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its agent, and cannot be said to have been made through ignorance. It is not the statement of the agent's belief that the block was included within the fences, and was six hundred feet front, but the positive averment of his own knowledge that it was so located, when it is conceded that he had no actual knowledge of the matter. If the agent had stated that he believed the land had a frontage of six hundred feet, and he believed it was included within the fences, and extended in front from fence to fence, the element of fraud would not exist. But the agent was aware that he had only an opinion or belief, which he imposed upon the plaintiff as knowledge. The rule is well stated in *Marsh v. Falker*, 40 N. Y. 562, which is followed by all the cases cited by the defendant. The party making the false statement "must have assumed or intended to convey the impression that he had actual knowledge of their truth, though conscious that he had no such knowledge." In this case the agent made statements as of his own knowledge that the land which he sold the plaintiff, and was then negotiating for, extended from fence to fence. He made these representations in such manner and in such terms as, stated in the cases cited by defendant, "were calculated to produce the conviction in the mind of the purchaser that he had personal knowledge of their truth; that he made the statement relied on upon what he knew as distinguished from what he heard. This was not true, and he himself knew at the time it was not true, and from these circumstances the intent to deceive the purchaser could very naturally be inferred." This extract very clearly states the law.

The case in 2 Allen, 214, is distinguished from this in that the true boundaries of the land sold were pointed out and information was thus given the purchaser, so that by a mere survey he could ascertain the correct quantity. So in 102 Mass. 247, the court decides that false representations are not actionable as to quantity when the true boundaries

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are pointed out; and in that case, also, when the deed was being drawn, the seller stated that the representation of the quantity of land was his belief only. The plaintiffs were not required, after the deed had been executed, to accept the offer of the defendant to refund the money received and declare the contract off. They had the option to allow the sale to stand, and by an action at law to recover for the injury sustained. The latter course is pursued, and the party liable for the fraudulent representations cannot object. The measure of damages is the value of the property lost by false representations, which were two lots included within the fences not belonging to the defendant; and Brown testifies these lots were worth \$800 each. I shall take this as a fair and just value, and judgment is ordered against the defendant for \$1,600, with costs. Consult 2 Pom. Eq. p. 352, § 884; *Smith v. Richards*, 13 Pet. 26; 3 Mo. 478; 9 Ves. 13, 21; 42 Vt. 121; 28 Mich. 53; 16 Ala. 785; 1 N. Y. 311; 86 N. Y. 84, 86; 47 Mich. 193 (*S. C.* 10 N. W. Rep. 196).

A motion in arrest of judgment, heard before Judges McCrary and Nelson, at the December term, 1883, was denied.

 JOHNSON v. ARMOUR and others.

(*District of Missouri. October, 1883.*)

1. **PERSONAL INJURY — DEFECTIVE MACHINERY — RESPONSIBILITY.**— The plaintiff sues to recover for injuries received while working on the defendants' elevator, and avers that certain portions of the elevator were defective. *Held*, that, to render the defendant liable, it must be shown that the portions claimed to be defective were necessary for the safe operation of the elevator; that they caused or contributed to the injury received; and that they were not repaired within a reasonable time after being brought to the defendants' notice.
2. **SAME — FELLOW-SERVANTS — MASTER'S RESPONSIBILITY — COMMON EMPLOYMENT.**— A master is not liable for an injury resulting to a

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servant through the negligence of a fellow-servant, not even though the fellow-servants are incompetent, unless such incompetency was known to the master, or might have been ascertained by the exercise of ordinary care; nor will the master be liable in any case, unless the incompetency caused, or contributed to, the injuries received. Common employment means work of the same general character.

8. SAME — SCOPE OF EMPLOYMENT — QUESTION FOR THE JURY. — A master is not liable for an injury sustained by a servant while performing work not in the line of his trade, and which he was not ordered to do. The question whether one is working in the line of his trade is for the jury.

At law.

KREKEL, *District Judge (charging jury)*. — The plaintiff, Johnson, claims damages from Armour & Co. on account of injuries received by him on the sixteenth day of January, 1883, while at work in their elevator. The claim is based upon the charge that the defendants did not furnish proper and safe machinery, and the further charge that defendants did not have competent servants in charge of the elevator machinery, and that in consequence of these neglects he was injured.

First, as to the machinery. The charge regarding such is that the appliances to ring the bell to give signals to the engineer in charge of the engine operating the elevator were out of order. This is a charge of negligence which the plaintiff makes, and is bound to prove to your satisfaction. The law does not presume negligence. If you come to the conclusion, from the testimony, that the defect claimed to have existed in the bell arrangement is not proven to your satisfaction, this will end your inquiry on that branch of the case. But if you shall find, from the testimony, that the bell arrangement was out of order, your next inquiry will be, did this cause or contribute to the injury complained of? If, under the evidence, you shall arrive at the conclusion that the defects of the bell arrangement, if any existed, did not cause or contribute to the injury complained of, in

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that case you must dismiss this charge of negligence from your consideration.

The want of a lever is the next charge regarding defective machinery. There is no dispute that the lever connected with the machinery was out of order. You have heard the testimony as to the office which the lever performed. Concerning it you will have to determine — *First*, whether a lever was necessary for the safe operating of the machinery; for if the elevator could be operated without it with reasonable safety, and the lever was only useful in the way of saving wear and tear, in that case it made no difference whether the lever was in order or not. In case you find, from the testimony, that a lever was necessary for the safe operation of the machinery of the elevator, you will next inquire, did this defect cause or contribute to the injury complained of? If you find it did not so contribute, in that case the defect of the lever did not create a liability on the part of the defendants. The law allows defendants a reasonable time for repairing defects in machinery after such defects come to the knowledge of the superintendent of the defendants. The reasonable time here spoken of must be gauged by the use made of the machinery in connection with the work to be performed by it, and the necessity of the repairs for safety.

If you shall find, from the testimony, that the lever was a necessary part of the machinery for operating the elevator, and that it could not be operated with reasonable safety without it, and you further find that it was not repaired within a reasonable time after the defects came to the knowledge of the defendants, and you still further find that the want of a lever caused or contributed to the injury complained of, the defendants would be liable unless their liability is avoided by any of the reasons or causes in this charge hereafter mentioned. In short, the lever must be necessary, neglect must have occurred in repairing it, the defect must have caused or contributed to the injury, otherwise the defendants are not liable.

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The next charge of negligence is that defendants did not have competent servants in charge of the machinery. Self-interest the law assumes to be sufficient to cause a proper selection of servants by him who employs them. To overcome this presumption, it must appear from the testimony that one or more of the servants in charge of the elevator machinery was incompetent, and that such incompetence was known to the defendants, and caused or contributed to the injury complained of. Though you may find there were incompetent servants in charge of the elevator machinery, yet, if this did not cause or contribute to the damages complained of, it must be disregarded by you in the consideration of this branch of the case. It is only when the incompetency on the part of servants is shown by the evidence, and that such incompetency came to the knowledge of defendants, or they might have known such incompetency by the exercise of ordinary care, that the defendants are liable.

Regarding plaintiff's going to work on the elevator, you are instructed that if the plaintiff was ordered to do specific work in the line of his trade as a carpenter, and that he, after finishing the designated task, proceeded to do work not in the line of his trade, which he was not ordered to do, and was injured while so engaged, he cannot recover. But what the work of his profession was as a carpenter must be judged of under the circumstances of this case. The plaintiff had been engaged in preparing ice for storage, and it is for you to determine whether he was out of the line of his occupation when he went into the elevator to fit its machinery for use by cutting away the ice testified to.

There remains the question of the relation in which fellow-servants engaged in the same employment stand towards each other, so that they must bear injuries brought upon them by the neglect of their fellows. The law is that the common employer is not responsible for injuries resulting from neglects committed by fellow-servants upon each other in their common employment. By common employ-

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ment is meant that the work upon which the servants are engaged is of the same general character. The trade of a carpenter differs from work of getting and preparing ice for the purpose of storage, and servants thus engaged, each upon his appropriate work, cannot be said to be in common employment. Yet, in the case before us, we find the plaintiff, a carpenter by trade, engaged on work fitting ice for storage, the same occupation upon which the ice-men were engaged. There is no doubt that a carpenter may engage upon other work than his trade, and when he does so he may pursue the common employment of those with whom he works, and thus fall within the category designated "common employment." The question whether this plaintiff was engaged in the employment of an ice-man at the time and on the occasion when he was injured is for you to determine under the evidence. If he was so employed he cannot recover if injured in consequence of the neglect of a fellow-servant. The engineer and the servant who controlled the movements of the elevator machinery are fellow-servants, and in common employment with the ice-men for the purposes of this case.

If you find the issues for the plaintiff, you will allow him the difference between his ability to earn before and after the injury, including suffering in consequence of his injury.

If you find the issues for the defendants, you will return a verdict accordingly.

Scott & Taylor, for plaintiff.

Pratt, Brumback & Ferry, for defendant.

Stevenson v. Chicago & A. R. Co.

STEVENSON v. CHICAGO & A. R. Co.

(Western District of Missouri. October, 1883.)

1. **PERSONAL INJURY — NEGLIGENCE — CONTRIBUTORY NEGLIGENCE — RAILROAD EMPLOYEES.**— In cases of unexpected and immediate danger, calculated to affect the judgment of him who is to meet it, a mistake made in his movements is not negligence.
2. **SAME — ACTS OF CO-SERVANTS.**— The acts of the plaintiff's co-servants *held*, for the purposes of this case, and to determine whether the plaintiff was guilty of contributory negligence, to be the acts of the plaintiff.

At law.

KREKEL, *District Judge (charging jury).*— Mary Stevenson sues the Chicago & Alton Railroad Company for killing her husband, Charles Stevenson. The cause of action, as stated in the declaration, is as follows: On the 27th day of February, 1883, Charles Stevenson, the husband of plaintiff, was in the employ of one Mead, who controlled an elevator on the grounds of the Chicago & Alton Railroad Company, and while engaged in unloading a car, using due care, was killed by the negligent running of a car of the defendant railroad company against the car Stevenson was unloading. The railroad company, in answering the charges made, denies all neglect, and avers that Stevenson, by his own carelessness, contributed to the injury of which he died. These pleadings, both declaration and answer, have been criticised. For the purposes of this trial they may be taken as sufficient, leaving any further consideration, if necessary, to be settled hereafter by the court.

The question you are to determine is, was the defendant railroad company neglectful in the performance of its duty, and did such neglect cause the death of Charles Stevenson? The plaintiff, the widow of Charles Stevenson, charges such neglect, and is bound to prove the charge to your satisfaction. The law does not presume negligence. Among the material

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points to be determined is the condition of the cars as they stood upon the corn track on the morning of the twenty-seventh of February, 1883. Were they coupled and properly secured by brakes? If they were, and the additional cars which were afterwards set upon the same track were handled with due care, defendant is not liable. For interferences, if any, by other than the railroad company employees, the company is not liable. If the employees of the railroad company either failed to make the coupling or to set the brakes so as to secure the cars on the track, and one of them became detached in consequence of their neglect and ran down the track, injuring the plaintiff's husband, the company is liable, unless Stevenson contributed to the injury himself, as hereafter pointed out. From the mere coming down of the car, without any fault or neglect on the part of the employees of the railroad company, you cannot infer negligence. You must be satisfied from the evidence that such coming down of the car was caused by some fault or neglect on the part of the employees of the railroad company.

Passing to the question of contributory negligence, you are instructed as follows: The railroad company, in its defense, says that the deceased, Stevenson, by his own acts contributed to his injury, and that the company, on that account, is not liable. This contributory negligence the railroad company charges on Stevenson, and must prove the same to your satisfaction. The deceased, Stevenson, had a right, in the pursuit of his employment, to go upon any part of the track of the railroad company to do the work in which he was engaged, but in doing so he was bound to use ordinary care. If the car coming down the track struck and injured Stevenson while engaged in his employment, without fault of his own, the company is liable, unless due care had been taken to secure the cars on the track, as already charged. In cases of unexpected and immediate danger, calculated to affect the judgment of him who is to meet it, a

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mistake made in his movements is not negligence. Thus, if you shall find from the evidence that the coming down of the car might reasonably cause apprehension of danger, and under the influence thereof the deceased attempted to pass between the cars and was caught thereby and injured, such an act is not an act of negligence on his part.

If, on the other hand, you shall find from the evidence that the deceased, Stevenson, or any one of those who were engaged with him in moving and unloading cars, removed the brakes from one or more of the cars standing on the corn track, or uncoupled one or more of them, and that in consequence thereof the car came down on the track, which otherwise it would not have done, and that the injury to the deceased resulted from this cause, such acts constitute contributory negligence. It makes no difference whether Stevenson or those who were engaged with him in removing cars interfered with them as stated. The acts of any of those who worked with Stevenson in removing cars, for the purposes of this case, are the acts of Stevenson; and if interferences, as charged, took place, it is contributory negligence, and the verdict should be for the defendant.

Stevenson had the right to be on the corn track of the railroad to repair his shovel, if he did so, and it is not contributory negligence on his part if he took the ordinary care and precaution against the usual and ordinary danger of his employment. What the duties of a railroad company setting a string of cars upon a grade, as to coupling and the setting of brakes, are, we have no satisfactory evidence, nor as to the obligations of persons engaged in moving cars in such a condition; that is, whether they are bound to see that the cars remaining on the track are properly secured. We have to pass upon the case as presented by the evidence, leaving these matters for further consideration of the court, if necessary.

If you find the issue for plaintiff, you will say so in your verdict, and fix the amount of damages at \$5,000.

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If you find the issues for the defendant, your verdict will be accordingly.

The present plaintiff has the same rights as her deceased husband would have had, and no others.

Tichenor, Warner & Dean, for plaintiff.

McFarland & Trimble and Gardiner Lathrop, for defendants.

LINN v. GREEN.

(District of Colorado. June, 1883.)

1. RESCISSION—NECESSARY AVERMENTS.—The rule in equity is, that it is not sufficient to charge a fraud simply, but there must also be alleged some injury as the result of such fraud. A slight injury will suffice. It is sufficient to allege that real estate was purchased upon the representation by the grantor that it was free from incumbrance, when in fact it was not. Real estate is not worth as much with as without incumbrance, and the purchaser is not bound to await an enforcement by the incumbrancer. As to the incumbrance, the purchaser may rely upon the representations of the seller, and is not bound to examine the records.

Ruling on demurrer.

McCrary, *Circuit Judge (orally)*.—This is a bill in chancery, filed to cancel and set aside a contract and conveyance whereby the defendant sold to the complainant an interest in a mine. The bill avers that the defendant falsely and fraudulently represented to the complainant that this property was free and clear of incumbrance, and that he was induced by these representations to purchase it and to pay for it the sum of \$1,500; that he afterwards discovered that the representations were false, that the property was not free from incumbrance, but was subject to a judgment lien of some \$700 against the defendant. Thereupon, immediately, as the bill avers, he tendered back a conveyance of the property, and demanded a return of the consideration money.

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There are various objections to the form of the bill, and some of them, perhaps, may be good in strictness, if we were to consider them with very great nicety and technicality; but the only matter of substance is the question whether there is an allegation of injury or damage here which is sufficient to give the complainant a right to relief in equity. He avers, as will be observed, that there was an incumbrance upon this property; that the representation was that it was free and clear from incumbrance; there is no allegation that the incumbrance has been enforced, or that complainant has been obliged to pay it in order to maintain his possession, or anything of that sort.

The rule in equity is that it is not sufficient to charge a fraud simply, but you must charge also some injury as the result of the fraud; I think, however, that there is an injury charged here. The rule does not require any considerable damage. A slight injury as the result of a fraud will give the party injured the right to bring his action and cancel the contract; and I think it may be said that where a man represents that a piece of real estate is free and clear of incumbrance, when in fact it is subject to incumbrance, and induces another to take it upon the belief that his representations are true, there is an injury. Real estate is not worth so much when it is incumbered as it is when it is not incumbered. The party who buys real estate upon the belief that it is free and clear from incumbrance, finding afterwards that he has been cheated in that respect, is not bound to keep it; he may return it.

It is also insisted that the records were sufficient to give notice to the purchaser of the judgment liens complained of. But the rule in regard to matters of this sort is that the purchaser has a right to rely upon the representations of the grantor, and is not bound to search the records to find whether they are true or not. The demurrer to this bill will be overruled, and the defendant will answer in sixty days.

Jerome v. Commissioners Rio Grande County.

TERRIBLE MINING Co. v. ARGENTINE MINING Co.

(*District of Colorado. November, 1883.*)

1. MINING CLAIM.—Essentials and extent of a valid location.

HALLETT, *District Judge*, in an oral charge to the jury, held: That the plaintiff bringing his action to recover possession of a mining claim must show a good location, in compliance with the statute in respect to locations, *i. e.*: He must show in his discovery shaft a vein or lode of valuable ore, in rock in place, as well as compliance with the statute in other regards. The miner is not bound to make the first shaft or opening which he may sink his discovery shaft. If, after sinking in one place, and failing to find a lode, he sinks in another and finds one, he may make the second his discovery shaft, on which location may be based. That it is competent for him to make any shaft he may sink his discovery shaft, but it must disclose a lode or vein in rock in place, not simply mineral in a fragmentary condition. A location is held valid only to the extent of the lode which is included within it. If a location is extended beyond the limits of the lode, in so far as it goes beyond the lode, it is held invalid, for the reason that the location gives no right to the surface except in connection with the lode.

JEROME v. COMMISSIONERS RIO GRANDE COUNTY.

WILDER v. THE SAME.

(*District of Colorado. December, 1883.*)

1. COUNTY WARRANTS — WHO MAY SUE.—County warrants payable to bearer are not negotiable as bills of exchange and promissory notes. All holders take them subject to any defense that may be made against the original payee. Nevertheless the property therein passes by delivery, when they are payable to the holder. Hence, when the holder is a citizen of another state, he may maintain action thereon

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in the federal court, even when the payee cannot maintain such action.

2. **SAME—DUE AS UPON DIRECT PROMISE.**—Such instruments are not assignable within the meaning of the act of congress of 1875 regulating the jurisdiction of federal courts (18 Stat. 470). They are taken to be due on an original and direct promise from the maker to the bearer, and not by assignment from the first holder.
3. **SAME—REMEDY.**—In such case, the remedy (in the United States courts) of the holder in the first instance is by action at law prosecuted to judgment, as a foundation for *mandamus* to compel the levy and collection of a tax for their payment.
4. **UPON WARRANTS** issued for interest on a judgment, an action will not lie.

On demurrer to complaint.

HALLETT, *District Judge.*—These actions are upon warrants signed by the chairman of the board of county commissioners and the clerk of the county, on the county treasury, for different sums, and payable to different persons or bearer; all of them excepting two (to be mentioned hereafter) appear to have been issued for the current expenses of the county. The warrants were not issued to the plaintiff, and the citizenship of the persons to whom they were issued is not averred. A question has arisen whether upon such warrants payable to a person named, or to bearer, which circulate from hand to hand without indorsement, an action may be maintained by a holder, a citizen of another state, against a county in this state, without showing that the persons to whom they were issued are qualified to sue in this court. It cannot be contended that such warrants are negotiable as bills of exchange or promissory notes, and free from all equities in the hands of an innocent holder. All holders take them subject to any defense that may be made against the payee, even when they are payable to bearer. Dillon's *Mun. Corp.* (3d ed.) secs. 487 and 503. Nevertheless, as they are payable to bearer, the property therein passes by delivery, and "a note payable to bearer is payable to anybody, and not affected by the disabilities of

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the nominal payee." *Bank of Kentucky v. Wister*, 2 Peters, 318. Such instruments are not assignable within the meaning of the act of congress of 1875, regulating the jurisdiction of this court. 18 Stat. 470. They are taken to be due on an original and direct promise from the maker to the bearer, and not by assignment from the payee or first holder. *Thompson v. Perrine*, 16 Otto, 589. This is true only when the plaintiff becomes the owner of the paper by the delivery thereof. If his title is colorable only and procured for the sole purpose of enabling him to bring suit in a federal court, the action will be dismissed. *Williams v. Nottawa*, 14 Otto, 209. But of that we have no information at present. Objection is also made that the demands for which the warrants were issued having been allowed by the board of county commissioners cannot be the subject of an action against the county. The remedy of plaintiff, if any, is by *mandamus* to compel the county to levy and collect a tax with which to pay the amounts due on the warrants. Whether this is the course of proceeding in the courts of this state is not shown; but it is certain that the practice in the federal courts is to proceed to judgment as a foundation for a writ of *mandamus*. It is only a question whether the money shall be taken to be due and owing from the county on the warrants alone, or after judgment on the warrants; and whatever the rule may be in the courts of the state, it is the settled rule of the federal courts to obtain judgment in the first instance. *Chickaming v. Carpenter*, 16 Otto, 663. In either case the county cannot be compelled to pay except in the time and manner provided by law. As to two of the warrants described in the sixth and seventh counts of Jerome's complaint, the rule may be different. They appear to have been issued to Rolins & Young for interest on a judgment. The right of a plaintiff to interest on a judgment recovered by him is the same as the right to the principal sum for which the judgment may have been entered, and the remedy to enforce

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payment thereof is the same. As to the judgment and the interest thereon, there appears to be no reason for allowing a second action in the same jurisdiction. A second action can only have the effect to multiply costs without substantial results. The demurrer will be sustained to the sixth and seventh counts of the complaint in Jerome's case, and otherwise overruled.

John L. Jerome, for plaintiffs.

L. C. Rockwell, for defendant.

OWENS v. WIGHT.

(*District of Colorado. December, 1883.*)

1. LEASE — COVENANT OF.— The execution of a lease for real estate implies a covenant to lessee for quiet enjoyment during the term.
2. SAME — REMEDY OF LESSEE.— In case of entry upon the demised premises by the lessor during the term, the remedy of the lessee is in damages by suit at law for breach of covenant, and not by action in equity for an accounting.

On demurrer to bill.

HALLETT, *District Judge*.— The bill avers that defendant and others demised to plaintiff a mining claim called the Vanderbilt lode for a term of six months, from March 7, 1883. That defendant afterwards and during said term entered on the said premises and took therefrom a large quantity of valuable ore, and plaintiff prays that defendant may be required to account for said ore. If, as alleged, defendant and others made a lease to plaintiff, a covenant for quiet enjoyment would be implied from such letting. Taylor's Landlord and Tenant, sec. 304; Sedgwick's Damages, 183, note. The entry into the premises by defendant during the time was a breach of the covenant, and plaintiff's

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remedy is in damages for such breach. What the measure of damages may be is not for present consideration. Upon the facts stated plaintiff is not entitled to an account, and the remedy is not in equity but at law. Plaintiff may have the case transferred to the law docket if he wishes to do so; whether the action shall be against the defendant alone, or against all of the lessors, is not now to be determined. Defendant should have demurred before answering, and therefore he must pay the costs of the answer, and the costs, if any, upon the issue of fact joined. The answer may be withdrawn and the demurrer will be sustained.

C. I. Thompson, for plaintiff.

A. W. Rucker, for defendant.

SAGE v. MEMPHIS & L. R. R. Co.

(Eastern District of Arkansas. December, 1883.)

1. RECEIVER—DISCHARGE BY COURT OF ITS OWN MOTION.—A court of equity will not conduct the business of a corporation through a receiver unless the interest of creditors unmistakably requires it; and when a railroad company, by collusion with a creditor who prays for the appointment of a receiver, allows its property to go into a receiver's hands, not for the purpose of meeting its obligation to the petitioning creditor, but for the purpose of keeping its property from other creditors, the court which appointed the receiver will, upon information of the facts, discharge him of its own motion.

In chancery.

Prior to the removal of this cause from the state court a receiver had been appointed and placed in charge of the railroad property and franchises of the defendant corporation. The case came before the court upon the application of Robert K. Dow and John L. Farwell, stockholders

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of the defendant corporation, to be made parties and to be allowed to file answers and cross-bills, which are tendered. Upon the argument of this motion the court requested counsel to discuss the question whether the court should not of its own motion, upon the facts appearing in the record, order the receiver to pass his accounts before the master, to the end that he may be discharged, and the court be relieved from the duty of conducting through a receiver the business of the defendant corporation. This question has accordingly been discussed by counsel for the plaintiff, but the counsel for the said Dow and Farwell declined to argue it, upon the ground that the parties represented by them were not interested therein.

The facts are as follows:

(1) This suit was originally instituted in the chancery court of Pulaski county, Arkansas, for the purpose of obtaining the appointment of a receiver to take possession of and operate the railroad and other property of the defendant; and upon presentation of a bill of complaint to that court on the twenty-fourth day of June, 1882, one E. K. Sibley was appointed such receiver and placed in possession of the property. The defendant waived notice, appeared at the hearing, and consented to the appointment.

(2) The bill alleges, as ground for the appointment of a receiver, that plaintiff had recovered judgment in the circuit court of the United States for the eastern district of Arkansas for \$125,921.13. By reference to the transcript of the judgment, it appears that it was rendered by confession upon the same day the application for appointment of a receiver was made. The bill also alleges that the defendant's property consists of a railroad running through the counties of Pulaski, Lonoke, Prairie, Monroe, St. Francis and Crittenden, together with cars, rolling stock and other property used in the management and operation of the road. It sets out the existence of two mortgages upon the property of the defendant,—one dated May 1, 1877, to secure bonds

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amounting to \$250,000, maturing in instalments of \$50,000 each, due May 1st, in the years 1879 to 1883, inclusive; and the other to secure bonds to the amount of \$2,600,000, payable July 1, 1907, bearing interest after July 1, 1882, at eight per cent. per annum, and having interest coupons attached. The bill further alleges that the aggregate amount of the bonds secured by said mortgages exceeds the salable value of the property and franchises of the defendant, or at least greatly exceeds the sum for which the same would sell under the hammer; and complainant believes that no bidder could be found at more than nominal amounts for said property, by reason of the existence of said mortgages. And a large part of the debt secured by the first mortgage being due and unpaid, it is alleged that the trustees in the mortgage could and would prevent the sale under execution of any part of said property, if plaintiff should attempt to enforce payment of his judgment by execution, and therefore to sue out an execution would be to incur useless expense; that if said property is kept together and operated, it will produce a large income, sufficient to pay operating expenses and a large surplus each year; that defendant has hitherto failed to apply its surplus income to the payment of complainant's debt, and, unless prevented, it will continue to so refuse, etc.

(3) Soon after his appointment, the receiver filed in said chancery court an inventory of the property turned over to him by virtue of his office.

(4) October 14, 1882, John L. Farwell filed petition to be made a party defendant, alleging that he is a stockholder of defendant, owning seventeen and one-half shares of the capital stock, and presenting an answer and cross-bill, alleging that the plaintiff's judgment was confessed by defendant company for no other purpose than as a preliminary step to the application to this court for a receiver, in order to hinder the prosecution of a certain suit by R. K. Dow, Watson Matthews and Charles Moran, theretofore instituted

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in the circuit court of the United States to enforce a claim against the railroad for about \$250,000, and to enable plaintiff and others interested with him to depreciate the market value of the bonds issued by defendant, and to depreciate the stock. It is alleged that the suit is a sham and a mere financial expedient, with no other object than to make a successful speculation in the stock and securities of the railroad company; that there is no antagonism either of feeling or interest between the plaintiff and defendant, but they have caused this suit to be brought and maintained in collusion with each other for a common purpose, etc., and numerous other allegations of like tenor and effect.

(5) November 1, 1882, the receiver reported to the chancery court that since his appointment he had received \$326,049.76, and paid out \$283,943.73, leaving balance on hand \$42,106.03; also that the debts outstanding, for labor, materials, supplies, etc., amounted to \$62,000. He reports that he has expended the money received for the benefit of the property, but nothing is said about the application of any part of it to the payment of plaintiff's judgment. He submits an engineer's statement showing that an expenditure of \$570,605 is necessary to put the road in repair, and he adds that \$100,000 is required for rolling stock and motive power.

(6) November 10, 1882, cause removed to this court.

(7) After the removal, and on the ninth of April, 1883, the receiver filed a report in this court asking for an appropriation of \$631,930 for repairs, which sum, he says, is within the actual wants of the company; and he adds: "After spending the amounts given in this statement, we will only have the tracks, bridges and wharf-boat, rolling stock and motive power in a safe condition to operate. You will note no provision is made for raising the road-bed east of Madison above high water, which, sooner or later, must be done to prevent the trade and traffic being stopped during the overflows of the Mississippi river and tributary streams."

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(8) At the same time the receiver filed a statement showing that the earnings of the road from June 25 to December 31, 1882, were \$478,425.47, and that the expenditures for the same period amounted to \$456,200.92, leaving as net earnings \$22,224.55; also a statement for the month of February, 1883, showing receipts \$73,449.60 and expenditures \$102,898.63.

(9) The last report of the receiver, filed the same day, shows:

Cash on hand June 24, 1882, the date of his appointment..	\$31,957 76
Cash received from June 25, 1882, to March 31, 1883, inclusive.....	854,815 62
Total	\$886,773 38
Expenditures.....	838,395 80
Balance on hand.....	\$48,377 58

Mr. Cockrell, for complainants.

B. C. Brown, for railroad company.

U. M. & G. B. Rose, for stockholders.

McCARY, *Circuit Judge*.—The ostensible purpose of the complainant in applying for the appointment of a receiver in this case was to compel the defendant company to apply a part of its earnings to the payment of his judgment. It now sufficiently appears that this was not the real purpose. The process of the court has not been used in good faith to collect complainant's judgment, but as a means of placing the property and business of the defendant railroad company in the hands of the court to be managed through a receiver, to the end that the defendant may not be subject to suits in the ordinary course of judicial proceedings, and in order to enable the plaintiff and defendant, by agreement between them, through the receiver, to apply all the earnings of the road during a series of years to the improvement and betterment of the property. In pursuance of this purpose

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the receiver, during the period of about nine months preceding his last report, had collected \$886,773.38, and had expended \$838,395.80 without applying a dollar toward the extinguishment of the complainant's judgment. And so far from proposing to pay the judgment or any part of it, he asks, in his report of April 9, 1883, for an appropriation of \$631,930 for repairs.

It is also apparent that this is not an adversary proceeding, but one in which the parties complainant and defendant have acted and are still acting in concert. The complainant's judgment was rendered by consent, and on the *same* day the receiver was appointed without opposition, the defendant voluntarily appearing and waiving service of process. The receiver has acted in accordance with the wishes of both parties, and it is undoubtedly with the assent of complainant that he has made no effort to pay the judgment, or any part of it, out of the earnings of the road. In short, the complainant and defendant have sought to make use of this court as an instrument to carry on, through the hands of a receiver, the important business of the defendant corporation; and this, not for the purpose, in good faith, of enforcing the confessed judgment set out in the bill, but for the purpose of protecting the property of defendant from seizure upon legal process, while the earnings are being applied to the improvement of the road. In other words, the court is asked to stand between the company and its creditors, while the company is engaged in using the earnings, not to pay its debts, but to improve its property.

It is said that this policy is best for the company and its creditors. Whether this be so or not is for the company and its creditors to determine; it is not for the court to engage in the operation of a railroad through a receiver, because the interests of the parties concerned may be thereby advanced. It does not appear that any suit has been commenced to foreclose either of the mortgages upon the road. As to other and smaller debts, no good reason is seen why

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they should not be either paid or enforced by the ordinary judicial proceedings. As to the complainant's judgment, it might have been paid in full from the earnings before this date, if such had been the purpose of this proceeding, and if complainant had insisted upon it. We cannot be expected to continue the receivership under such circumstances. The views of this court upon this subject are well expressed in the opinion of Caldwell, J., in the case of *Overton v. Memphis & L. R. R. Co.* 10 Fed. Rep. 866, as follows:

"Undoubtedly there are cases in which a court of equity may, through its receiver, take possession and control of the property and business of corporations and individuals. But it is a jurisdiction to be sparingly exercised. None of the prerogatives of a court of equity have been pushed to such extreme limits as this, and there is none as likely to lead to abuses. It is not the province of a court of equity to take possession of the property and conduct the business of corporations or individuals except where the exercise of such extraordinary jurisdiction is indispensably necessary to save or protect some clear right of a suitor, which would otherwise be lost or greatly endangered, and which cannot be saved or protected by any other action or mode of proceeding. If, as in this case, the loss or danger can be averted by the lawful action of the suitor, or those he represents, he cannot successfully invoke the exercise of the extraordinary powers of a court of equity because that course would be more agreeable or convenient."

The order will be that the receiver pass his accounts before the master with a view to his final discharge at an early date.

After the preparation of the foregoing opinion and order, but before it was filed, the court was asked to hear and consider further argument, and to delay action, which request was granted. Additional and very elaborate arguments were filed, but, upon considering them, we found nothing to change our views as above expressed. Before announcing

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our conclusion, the writer of this opinion was presented with a written agreement by counsel in the case, stipulating that the receiver should be discharged upon filing the receipt of the railroad company for the balance in his hands. An order of this character was signed under the impression that all the parties in interest had consented thereto. This impression may have been correct, but it is insisted by certain parties, who claim the right to be heard, that they did not consent, and that they now desire to be heard to object. They are understood to be judgment creditors who had applied for leave to intervene, and whose application was and is still pending. Although these persons were not technically parties to the record, they have at least the right to be heard upon their application to intervene, and to have that application formally passed upon before the receiver should be discharged in any irregular or unusual way. And it may well be that the court should hear their objection to this mode of discharge, upon the ground that they have an interest in the question as judgment creditors of the defendant. At all events, it would be improper, while these parties thus situated are objecting, to release the receiver from the duty of passing his accounts before the master.

The court can adhere to the order signed as above stated only upon being clearly satisfied that it was in accordance with the desire of all who have any, even the slightest, interest in the matter. That order will therefore be set aside; and the court, of its own motion, *and not acting* upon the stipulation of counsel, directs that the order be as directed in the foregoing opinion, to wit, that the receiver pass his accounts before the master, with a view to his discharge at an early day. The court adds that counsel have acted in good faith in presenting the agreement, and in representing that it was signed for all the parties. That is strictly true; but it is also true that the order was signed under the impression that the application for leave to intervene by certain judgment creditors had been overruled, and was therefore not still pending.

Cone v. Combs and others.

CONE v. COMBS and others.

(District of Minnesota. November, 1883.)

1. **MORTGAGE — APPOINTMENT OF RECEIVER FOR PROTECTION OF MORTGAGEE.**— It must clearly appear, before a receiver of rents and income will be appointed for the protection of the mortgagee, that the mortgagor is hopelessly insolvent and the property inadequate security for the debt.
2. **SAME — LACHES OF MORTGAGEE — FAILURE TO ENFORCE DECREE OF FORECLOSURE.**— Where the mortgagee delays his suit for foreclosure and permits the mortgagor to use the property for several years, a very strong case of probable injury to the rights of the mortgagee must be made out, and there must be a pressing necessity for the interposition of the court; and if a decree has been rendered and a sale ordered, and the mortgagee still neglects to have it enforced, the emergency must be grave, and an imperative necessity for the relief be shown to exist, before a court will exercise this extraordinary jurisdiction.

The defendant mortgaged his homestead for a debt which matured in the year 1878. Suit was commenced to foreclose the mortgage in the year 1883. In the month of April a final decree was entered. The property has not been offered for sale, and now, on November 7, A. D. 1883, a motion is made by the mortgagee for a receiver of rents and income.

H. J. Horn, for motion.

W. D. Cornish, contra.

NELSON, *District Judge*.— The mortgagee, having obtained a decree of sale and foreclosure of his mortgage after the lapse and period of nearly seven months from the rendition of his decree, without enforcing it, asks for the appointment of a receiver for the rents and profits until the mortgagor's right to redeem has expired, or the mortgage debt is paid. This is substantially the relief prayed for. This petition appeals to the extraordinary jurisdiction of a court of equity, which only is exercised in great emergency and with extreme caution. It must clearly appear, before a receiver of rents

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and income will be appointed for the protection of the mortgagee, that the mortgagor is hopelessly insolvent and the property inadequate security for the debt. If the property mortgaged is of much less value than the debt and accrued costs, and the mortgagor (who is personally liable) is insolvent, the mortgagee is usually entitled to a receiver, and this court heretofore has granted this relief when these elements have been clearly found to exist. In this case the proof is beyond doubt that the personal liability of the mortgagor is gone, and should a deficiency exist after sale of the mortgaged property, it could not be collected. The mortgagor has been discharged as a bankrupt and is not personally liable for this debt; but it is not satisfactorily proved that the mortgaged property is inadequate security. The burden is upon the mortgagee to establish this fact, as the presumption is, the property, when mortgaged, was ample security, and this presumption continues until the contrary is proved. There is a good deal of doubt as to the inadequacy of the security. The rate of interest for the loan is large, and although the debt matured in 1878, no steps were taken to foreclose the mortgage until 1883. If a suit to foreclose had been instituted then (for anything that appears to the contrary), the mortgagee would have long since had the property sold to pay the debt.

While it is true that the mortgagee may delay his suit for foreclosure after the debt is due, and default of the mortgagor to pay it, yet if he delays his remedy and permits the mortgagor to use the property for several years, a very strong case of probable injury to the rights of the mortgagee must be made out, and there must be a pressing necessity for the interposition of the court; and if, as in this case, a decree has been rendered and a sale ordered, and the mortgagee still neglects to have it enforced, the emergency must be grave, and an imperative necessity for the relief be shown to exist, before a court will exercise this extraordinary jurisdiction.

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The evidence of value is conflicting, but many witnesses familiar with the mortgaged property place its value at several thousand dollars more than the debt.

Again, the property mortgaged in this case is the homestead of the mortgagor, and it is a matter of great doubt whether his possession should be disturbed in any event until after a sale and deficiency appears. True, the property is not now occupied by the mortgagor and his family, yet by the law of the state he loses none of his homestead rights by the attempt to derive an income from it.

Motion for receiver denied.

KELLEY, Administratrix, v. THE CENTRAL RAILROAD OF IOWA.

(District of Iowa, Central Division. October, 1883.)

1. **INJURY CAUSING DEATH — MEASURE OF DAMAGES UNDER IOWA STATUTE.**— Under the statute of Iowa giving to the legal representatives of a person killed by the negligence of another, a right of action to recover damages therefor, the measure of damages is the sum necessary to compensate the estate of the deceased for the loss occasioned by his death. The facts and circumstances which may be considered by the jury, stated.

This was an action at law brought by Mary Kelley, administratrix of the estate of Nicholas Kelley, deceased, to recover damages for personal injuries to said Nicholas Kelley, caused by the negligence of defendant, and resulting in his death.

The statute of Iowa provides that:

“All causes of action shall survive and may be brought notwithstanding the death of the person entitled or liable to the same.”

“The right of civil remedy is not merged in a public offense, but may, in all cases, be enforced independently of, and in addition to, the punishment of the latter. When a wrongful act produces death, the damages shall be disposed

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of as personal property belonging to the estate of the deceased, except that if the deceased leaves a husband, wife, child or parent, it shall not be liable for the payment of debts." McLain's Code, secs. 2525, 2526.

It is also provided by sec. 2527 that such actions may be brought or continued by or against the legal representatives or successors of the deceased.

The only question of general interest passed upon by the court was that of the measure of damage in such cases.

C. H. Gutch, for plaintiff.

Blair & Daly, for defendant.

McCRARY, *Circuit Judge*, in charging the jury, orally, among other things, said:

If you find for the plaintiff you will assess her damages at such just and reasonable sum as will compensate the estate of the deceased for the loss occasioned by his death. In determining what this amount shall be, in case you come to the question of damages, you will consider the circumstances of the deceased: his occupation, age, health, habits as to industry, sobriety and economy, the amount of his property, if any, and the probable duration of his life, and from these elements you will determine what his annual income during life would probably have been which would have been saved to his estate, and not expended, and a gross sum which would have produced a like income at interest will be a proper sum to be allowed as damages. I do not say that you are obliged to find the amount by this process. You may exercise your discretion as to the mode of arriving at the value of the life of the deceased to his estate, but that value when ascertained and fixed by you must be the sum of your verdict. This mode is suggested as a convenient one, which you can adopt if you choose. In a case of this character you are not to take into account the pain and suffering of the deceased, nor the wounded feelings or grief of his rela-

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tives, in fixing the damages. What you are to ascertain and by your verdict decide, if you come to the question, is, what, according to the evidence, would have been the probable pecuniary benefit to the estate of the deceased from the continuance of his life.

This you are not expected to determine with accuracy, as that would be impossible; but you are to fix, according to your best judgment in the light of the evidence, what the amount would probably have been. Reasonable probability is all that can be expected in such a case. No arbitrary rule can be laid down. The elements which enter into the question of the value of a life to the estate of the deceased are so various that the matter must be left, under proper instructions from the court, to the sound discretion of the jury. The purpose of the statute under which this suit is brought is compensation. It is not the loss of the deceased, but the loss of the estate, which is to be estimated. The purpose of the statute is to make good to the heirs or representatives of the person killed that which they have probably lost by his death. To ascertain this, it is of course necessary to take into view all the facts and circumstances which bear upon the question what his accumulations would probably have been. Among the questions proper to be considered in the light of the evidence are the following:

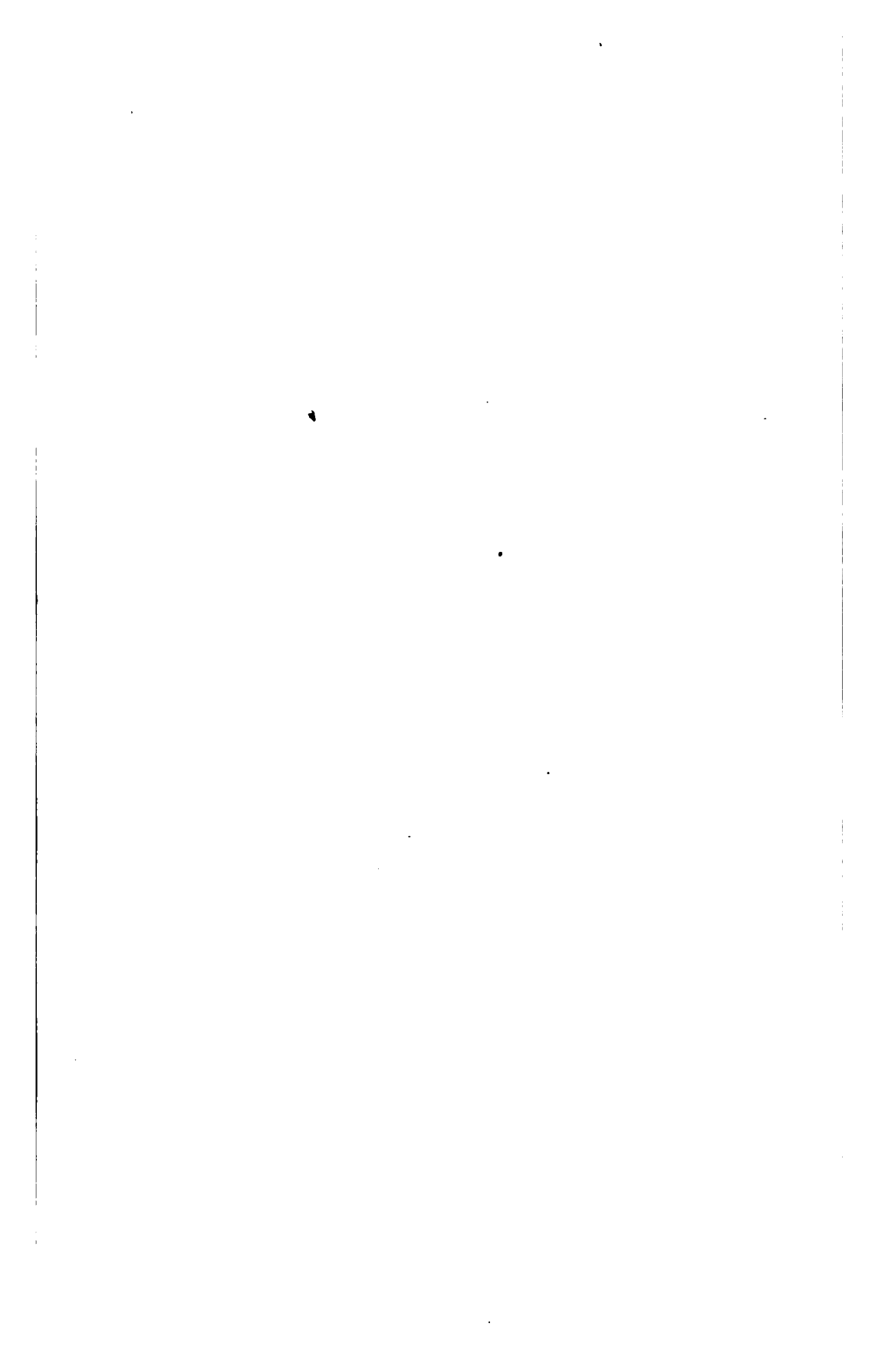
Had the deceased, previously to his death, saved his earnings?

Had he contributed to his mother's support?

Was he a sober, industrious man, or was he habitually intemperate?

Was he economical or was he a spendthrift?

From all the facts and circumstances, if he had lived, what sum, if any, would he probably have accumulated in the course of an ordinary life-time, to be left to his heirs?



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ADMIRALTY.

1. LIEN FOR SUPPLIES FURNISHED AT HOME PORT.— A party furnishing a vessel with supplies at its home port on credit is not entitled to an admiralty lien upon the vessel, except where a lien is given by a local statute. *The Red Wing*, 122
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8. SAME — PROCEEDING IN PERSONAM — UNLAWFUL OBSTRUCTION. — Where a vessel is injured by a collision with a structure unlawfully placed in the navigable bed of a river, the party creating the obstruction may be sued for the injury in an action *in personam* in a proper court of admiralty; but the owners of the vessel cannot in such a case proceed *in rem* against the solid structure, whatever it may be, because there can be no maritime lien upon such a structure to be enforced in the admiralty by its seizure and sale. *Id.*
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ADMIRALTY — continued.

been floated against it by reason of a flood raising the waters of said river above the banks thereof and carrying said vessel beyond said banks, this does not constitute a tort within the jurisdiction of a court of admiralty. *Id.*

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ASSIGNMENT — continued.

laborers and employees) shall be distributed ratably among all other creditors, is violated by a debtor who pays one of his creditors by delivering to him a part of his property and the same day assigns the balance to an assignee for the benefit of creditors, where the two transactions are simultaneous, or so nearly so as to constitute parts of one and the same transaction. *Doggett, Bassett & Hills Co. v. Herman et al.*, 269

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2. **"IN FAILING CIRCUMSTANCES."**— The phrase "in failing circumstances," used in the constitution and statutes, when applied to a bank, must be taken to mean a state of uncertainty whether the bank will be able to sustain itself, depending on favorable or unfavorable contingencies, which in the course of business may occur, and over which its officers have no control. *Id.*
3. **RECEIVING DEPOSITS — KNOWLEDGE OF CASHIER — BURDEN OF PROOF.**— In an action against the president, directors, cashier or agent of a bank, under the act of April 23, 1877, for receiving a deposit knowing that the bank was insolvent or in failing circumstances, the plaintiff is only bound to prove to the satisfaction of the jury that the bank was insolvent. Upon this showing, the officers of the bank, to escape liability, must prove that they did not have the knowledge the law imputes to them, and thus overcome the law, which says they did know. The burden of proof of the want of knowledge of insolvency is on the officer sued. *Id.*

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2. TOWAGE CONTRACT — EXCEPTED PERILS.— Where the owner of a tow-boat agrees to tow a barge containing a cargo from St. Louis to New Orleans, and to deliver the barge and cargo to a consignee at the latter place, "the dangers of navigation and other known or unknown obstacles excepted," and said tow-boat ran said barge against a tree, which had recently fallen into the channel, and was entirely submerged and hidden from view, and the presence of which in the channel was unknown and not discoverable by care and skill on the pilot's part, and said barge and cargo were greatly damaged, *held*, that the accident arose from an excepted peril, and that the owner of the tow-boat was not liable. *Id.*
3. UNNECESSARY DELAY — DAMAGES.— Where there is unnecessary delay on the part of a common carrier in the delivery of goods which he has undertaken to transport, and the market price of such goods at the place of delivery is lower at the time of delivery than at the time when the delivery should have taken place, the carrier is liable in damages for the difference between the value of the goods at the former and their value at the latter date, at market prices. *Milne v. Douglass*, 401
4. PURCHASER OF RAILROAD TICKET BOUND TO COMPLY WITH ITS CONDITIONS — AUTHORITY OF CONDUCTOR.— Where a round-trip ticket is purchased stipulating for the performance before the authorized agent of the railroad company of certain conditions in said ticket expressed, *held*, that the absence of such agent was not a sufficient excuse for non-compliance, and that the conductor had no power to pass upon the sufficiency of the excuse. *Mosher v. St. L., I. M. & S. R. Co.*, 463
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COMMON CARRIER — continued.

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7. COMMON CARRIER — NEGLIGENCE — DUTY OF PASSENGER. — A railway passenger is bound to exercise ordinary care and prudence to preserve himself from injury. *Mackoy v. Missouri Pac. R'y Co.*, 538
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10. SAME — MEASURE OF DAMAGES. — In such cases the injured party is entitled to an amount which will compensate him for the injuries sustained, and the expenditures he has had to make and the liabilities he has incurred in consequence of the injury, and for the pain and suffering he has undergone, taking into consideration the permanent or temporary character of the injuries. *Id.*
11. SAME — DAMAGES — EVIDENCE — PRACTICE. — Where evidence was admitted concerning the plaintiff's dependence for his support upon his labor, but the court, in laying down the rules as to the elements of damages, in its charge to the jury omitted the dependence of the plaintiff upon his personal labor for his support, *held*, that the error, if any, in admitting such evidence was cured by the charge. *Id.*
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13. SAME — BILL OF LADING — LIMITATION OF LIABILITY. — Where it was orally agreed between A., a shipper, and B., a common carrier, that the latter should transport all goods which the former desired to ship from X. to Z., for a certain sum per hundred pounds, regardless of value, and A. shipped certain packages by B. under said agreement, but took a bill of lading therefor, which provided that unless the shipper had the value of his packages

COMMON CARRIER—continued.

inserted in the bill of lading given for them the carrier would not be liable for an amount exceeding \$50 on each package, but the values of the packages were not asked for by B. or inserted in the bill of lading, and the goods were lost *in transitu* through B.'s negligence, *held*, that B. was liable for their full value. *Id.*

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COMPROMISE.

1. **AS CONSIDERATION FOR DEED—SUIT FOR BREACH OF CONTRACT—EVIDENCE.**—In a suit to recover damages for breach of contract, in that certain lands conveyed in settlement of another proceeding, upon the representations of the defendant therein as to quality and without being seen by the plaintiff, *held*, that evidence as to the consideration of the indebtedness upon which the first suit was brought is inadmissible, and that the settlement or compromise of the litigated question is a valid consideration for the conveyance of the land. *Bartlett et al. v. Smith*, 416

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CONSTITUTIONAL LAW.

1. **COMPENSATION FOR PROPERTY TAKEN FOR PUBLIC USE—CONSTITUTION OF MISSOURI OF 1875.**—By the constitution of Missouri adopted in 1875, it was evidently intended that before property could be taken for public use the amount of compensation to be made to the owner should be ascertained and paid, and when this has not been done the owner may recover its value in any proper form of action. *Blanchard v. City of Kansas*, 217
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county to improve swamp lands situated within its limits, upon being petitioned by a majority in interest of the owners of such lands to do so, and upon being shown by such owners that the improvement is practicable and their declaring themselves willing to pay their just proportion of the expenses; and, provided that the benefit to the county should be estimated and be paid by the county, and that funds to pay the balance of the expenses should be raised by the county by issuing county bonds, and that funds to pay the bonds should be raised by taxes assessed exclusively on the lands benefited,— *held*, that the statute was valid and did not authorize the county "to loan its credit to any company, association or corporation," within the meaning of the provision of article 14, § 11, of the constitution of Missouri. *Shelley v. St. Charles Co.*, 474

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1. POWER OF PUNISHMENT UNDER — U. S. REV. STAT., SEC. 735.— In proceedings under sec. 725, Revised Statutes of the United States, for contempt of a decree of court, the court has power to punish by fine and imprisonment only, and cannot make an order in the nature of further directions for the enforcement of the decree. *Denver & N. O. R. Co. v. A., T. & S. F. R. Co.*, 287
2. PROOF REQUIRED — PRESUMPTION OF INNOCENCE.— In order to justify the punishment prescribed by the above statute, the fact of the guilt of the accused must be clearly established. If the terms of the decree are ambiguous, or if men of equal intelligence might honestly differ as to their meaning or construction, defendant is entitled to the benefit of a presumption of innocence until the court has, by further directions, made the meaning plain, after which disobedience must be punished. *Id.*

CONTINUANCE. See *Practice*, 8.

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1. RESCISSION — NECESSARY AVERMENTS.— The rule in equity is, that it is not sufficient to charge a fraud simply, but there must also be alleged some injury as the result of such fraud. A slight injury will suffice. It is sufficient to allege that real estate was purchased upon the representation by the grantor that it was free from incumbrance, when in fact it was not. Real estate is

CONTRACT—continued.

not worth as much with as without incumbrance, and the purchaser is not bound to await an enforcement by the incumbrancer. As to the incumbrance, the purchaser may rely upon the representations of the seller, and is not bound to examine the records. *Linn v. Green*, 637

2. LETTER OF CREDIT—WHAT IS NOT.—A letter such as the one following, written by the defendants to the plaintiff, does not constitute a letter of credit:

“CHICAGO, 7-23-1880.

“*State National Bank, Lincoln, Nebraska:*

“GENTLEMEN—Mr. Dawson, of Dawson & Young, has been to see us, and has explained their business to our satisfaction, and we wish them to continue with us, and we expect to take care of them and pay drafts as heretofore.

“Respectfully, WILLIAM YOUNG & Co.”

State Nat'l B'k v. Young et al.,

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3. AGREEMENT TO ACCEPT DRAFT.—Nor does the same amount to an agreement to accept any drafts which Dawson & Young, or either of them, might draw on William Young & Co., the defendants. To constitute a valid and binding promise to accept the draft of another, the draft must be described in terms not to be mistaken. *Id.*
4. DEPARTURE FROM TERMS.—Any departure from the terms of an agreement to accept the bill or draft of another will not bind the party sought to be charged as acceptor. *Id.*
5. OPTION CONTRACTS—VALIDITY OF.—Option contracts are not necessarily illegal, and the incident of putting up margins amounts to nothing unless the contract itself is illegal. The validity of such contracts depends upon the mutual intention of the parties as to the actual sale and delivery of the property, or a pretended and fictitious sale, to be settled upon differences. *Union Nat'l Bank of Chicago v. Carr et al.*, 71
6. SAME—INTENTION OF PARTIES.—When it is the intention of the parties to contracts for the sale of commodities, that there shall be no delivery thereof, but that the transactions shall be adjusted and settled by the payment of differences, such contracts are void. *Cobb v. Prell*, 80
7. SAME—BURDEN OF PROOF.—It is the duty of the courts to scrutinize very closely contracts for future delivery; and if the circumstances are such as to throw doubt upon the question of the intention of the parties, it is not too much to require a party claiming rights under such a contract to show affirmatively that it was made with actual view to the delivery and receipt of the commodity. *Id.*

CONTRACT — continued.

8. **SAME — CONTRACTS HELD VOID.**— As the evidence in this case establishes the fact that the parties did not intend the actual delivery of the corn contracted for, but did intend to speculate upon the future market and to settle the profit or loss of defendant upon the basis of the prices of grain on the thirty-first of May, 1881, as compared with the prices at which defendant contracted to sell, the contracts sued upon are void, and plaintiff cannot recover. *Id.*
9. **SALES — DAMAGES.**— Where A., in St. Louis, telegraphed to B., in New York, an offer to sell stock at a certain price, "St. Louis delivery," and B. answered by telegraph, "Accept your offer; draw on me with certificate attached payable at office of C., New York," and afterwards other telegrams pertaining to delivery were sent: *Held*, (1) that the contract of sale was closed by the sending of B.'s first telegram; (2) that the contract was for a delivery at St. Louis; (3) that B. was entitled to the difference between the market value of the stock at St. Louis at the time of the sale and its value at the time of A.'s refusal to deliver, with legal interest. *Brooks v. Coquard*, 588
10. **CONTRACT OF SALE — SPECIFIC PERFORMANCE.**— A contract for the purchase and sale of an interest in mining property at a price named therein, in which contract is the following clause: "Provided, always, in the event of such failure to complete such purchase, he (the purchaser), his heirs and assigns, upon the delivery of possession of said lands and mining premises as aforesaid to the parties of the first part, their heirs and assigns, shall in nowise be held responsible for the payment of said purchase money:" *Held*, that upon refusal to redeliver the property to the sellers on demand, the latter had the right to treat the contract as a sale, and proceed to enforce its specific performance in equity. *McConville v. Howell et al.*, 819

CONTRIBUTORY NEGLIGENCE. See *Negligence*.

CONVEYANCE. See *Equity*, 1. *Fraudulent Conveyance*, 1, 2.

CORPORATION. See *Equity*, 25. *Insurance*, 4. *Jurisdiction*, 1, 2, 3, 4. *Removal*, 8, 9. *Receiver*, 1.

1. **STOCKHOLDERS — DOUBLE LIABILITY CLAUSE — JUDGMENT OBTAINED BY COLLUSION.**— Where A., a stockholder in an insolvent bank, became liable in the sum of \$1,200, under a double liability law, to the creditors of the bank, and was sued for that amount by B., an admitted creditor, and A. a few days thereafter, and before judgment could be had in the ordinary course, agreed with C. that, if the latter would buy up claims against the bank to the amount of his liability, he would confess judgment in his favor, and C. accordingly bought up claims to that

CORPORATION — continued.

amount at a large discount from a stockholder in said bank, and A. confessed judgment in his favor for the full amount of the claims, and paid the same, *held*, that such judgment and satisfaction could not be pleaded in bar to the suit brought by B. *Manville v. Karst*, 142

2. MUNICIPAL CORPORATIONS — STATUTE OF LIMITATIONS — ESTOPPEL IN PAIS. — When a municipal corporation seeks to enforce its private rights, as distinguished from rights belonging to the public, it may be defeated by force of the statute of limitations; but in all cases wherein the corporation represents the public at large or the state, or is seeking to enforce a right pertaining to sovereignty, the statute of limitations, as such, cannot be made applicable. In such cases, however, the courts may apply the doctrine of estoppel *in pais*, and by means thereof, when justice and right demand it, prevent wrong and injury being done to private rights. *Simplot v. Chi., Mil. & St. P. R. Co.*, 158
3. NOTE OF CORPORATION — WHO MAY EXECUTE. — The authority of an officer of a corporation to execute its note depends upon the by-laws, or upon the custom of the corporation. If it be the custom of a corporation to permit the treasurer to execute its promissory notes, the corporation will be bound by such note; especially if it received the benefit of the money for which it was executed. *Foster v. Ohio-Colo. Reduc. & Mining Co.*, 329
4. SUIT BY STOCKHOLDERS — PREREQUISITES. — Before a stockholder can sue in his own name he must show to the satisfaction of the court that he has exhausted all the means within his reach to obtain within the corporation itself the redress of his grievances, or action in conformity to his wishes. *Foote et al. v. Cunard M. Co. et al.*, 251
5. SAME — BILL MUST SHOW WHAT. — In such a case the bill must set forth with particularity the efforts of the plaintiff to secure such action as he desires on the part of the managing directors or trustees, and if necessary, of the shareholders, and the causes of his failure to obtain such action. *Id.*
6. SAME — PROBABLE REFUSAL OF CORPORATION TO ACT. — It is not enough that it appears from the bill that the corporation would probably refuse relief. The rule is imperative that efforts should be made to obtain relief in that direction before suit can be instituted by a stockholder. *Id.*
7. CONFESSION OF JUDGMENT — COLLATERAL ATTACK. — Upon a confession of judgment by a corporation, the court in which the action is pending must, of necessity, judge of the authority of any natural person who may appear for the company in that behalf, whether it be an attorney at law or an agent of the company, and its judgment as to the right and authority of the per-

CORPORATION — continued.

son so appearing to bind the corporation must be conclusive in all other proceedings where the same judgment is drawn in question and not open to collateral attack. *White, Agent, v. Crow*, 810

RIGHT TO REDEEM — PAYMENT OF PART OF CLAIM — REFUNDING MONEY PAID.—Where a party owning an interest in the property of a corporation that has been sold under execution and purchased by several parties constituting a pool, has, with a view to redeeming such property, paid to such parties a portion of the claims against the company, they cannot, while retaining the amounts so paid, deny the right of such party to redeem, on the ground that the time allowed by the statute for redemption has expired; and unless within a reasonable time they refund the money so paid, a decree allowing redemption or payment of the balance of the claims will be passed. *Id.*

9. **ACTION FOR MONEY HAD AND RECEIVED — CHARTER.**—A corporation, like a natural person, may be compelled to account for the benefits received from a transaction, even if it be one not enforceable by reason of the fact that its agents have no right to make it, unless it be in its nature illegal or immoral; and if the agreement under which the corporation has received and appropriated money or property cannot be enforced, it cannot be heard to refuse to account on the ground that it had no power under its charter to take it, and action may be sustained, without reference to the agreement, to recover whatever money may be justly due for the value received. *Manville v. Belden Min. Co.*, 891

CO-SERVANT. See *Negligence*, 5.

COUNSEL. See *Practice*, 6. *Railroad*, 10.

COUNTERCLAIM. See *Pleading*, 2.

COUNTY WARRANT.

1. **WHO MAY SUE.**—County warrants payable to bearer are not negotiable as bills of exchange and promissory notes. All holders take them subject to any defense that may be made against the original payee. Nevertheless the property therein passes by delivery, when they are payable to the holder. Hence, when the holder is a citizen of another state, he may maintain action thereon in the federal court, even when the payee cannot maintain such action. *Jerome v. Commissioners Rio Grande County*, 639
2. **DUE AS UPON DIRECT PROMISE.**—Such instruments are not assignable within the meaning of the act of congress of 1875

COUNTY WARRANT — continued.

regulating the jurisdiction of federal courts (18 Stat. 470). They are taken to be due on an original and direct promise from the maker to the bearer, and not by assignment from the first holder. *Id.*

3. REMEDY. — In such case, the remedy (in the United States courts) of the holder in the first instance is by action at law prosecuted to judgment, as a foundation for *mandamus* to compel the levy and collection of a tax for their payment. *Id.*
4. UPON WARRANTS issued for interest on a judgment, an action will not lie. *Id.*

COVENANT. See *Lease*, 1.

COURTS. See *Federal Courts*.

COURTS — STATE. See *Admiralty*, 4, 5. *Federal Courts*, 2.

CREDIT, LETTER OF. See *Contract*, 2.

CREDITORS. See *Assignment*, 1, 3. *Equity*, 7, 12. *Fraudulent Conveyance*, 1, 2. *Indictment*, 5.

CRIMES. See *Public Lands*.

1. POSTAL SERVICE — DETAINING AND OPENING MERCHANDISE — R. S. § 3891. — It is a criminal offense, under section 3891 of the Revised Statutes, for any one in the employ of any department of the postal service to unlawfully detain, delay or open any mailable packet of merchandise which has come into his possession and which is intended to be conveyed by mail. *United States v. Blackman*, 438

CRIMINAL CASES. See *Depositions*, 1, 2, 3, 4.

CROPS. See *Mortgage*, 2.

CROSS-BILL. See *Equity*, 15, 16, 17, 18. *Railroad*, 23.

CUSTODY. See *Admiralty*, 4, 5.

CUSTOM. See *Railroad*, 15.

DAMAGES. See *Common Carrier*, 3, 10, 11. *Contract*, 9. *Mining Claim*, 3. *Negligence*, 14, 20, 21. *Officer*, 3.

1. COMMISSION ON SALES OF ABANDONED PROPERTY NOT ALLOWABLE. — Where property damaged through the negligence of a common carrier was abandoned by the owner to the underwriters, who paid the loss, sold the property, and brought suit against the carrier for damages, *held*, that said underwriters were not entitled to any commission on said sales. *Sun Mutual Ins. Co. et al. v. Miss. Valley Transp. Co.*, 265

DANGER — KNOWN. See *Negligence*.

DEBT. See *Pledge*, 5, 6. *Railroad*, 9.

DEBTOR. See *Equity*, 7.

DECEASED. See *Estates*.

DECREE. See *Mortgage*, 5. *New Trial*, 2. *Railroad*, 10. *Service*, 1, 2.

DEDICATION. See *Patent*, 10.

DEED. See *Assignment*, 1. *Compromise*, 1. *Mortgage*, 1.

1. SPECIAL WARRANTY DEED.—A deed with a special warranty against all persons claiming by, through or under the grantor cannot be extended to a general covenant of warranty against all persons; and the rule is that a party has no remedy on the ground of a mere failure of title, if he has taken no covenants to secure the title, and there is no fraud in the case. *Buckner v. Street*, 59
2. SAME—STATUTE OF LIMITATIONS.—In Arkansas the plea of the statute of limitations of five years to a note given for the purchase money of lands is not good in bar of a decree *in rem* for a sale of the lands; but it is a bar to the recovery of a personal judgment against the defendant. *Id.*

DEFECT. See *Pleading*, 3.

DEFECTIVE MACHINERY. See *Master and Servant*, 1. *Negligence*, 15.

DEPOSITIONS.

1. IN CRIMINAL CASES—R. S. § 866.—Section 866 of the Revised Statutes, which authorizes a *dedimus potestatem* to take depositions according to common usage, to be issued in any case in which it is necessary, in order to prevent a failure or delay of justice, applies to criminal as well as civil cases. *United States v. Cameron et al.*, 93
2. SAME—"COMMON USAGE."—The words "common usage," as used in said section, refer to the usage prevailing in the courts of the state in which the federal court may be sitting. *Id.*
3. SAME—"FAILURE OR DELAY OF JUSTICE."—The question whether the order is necessary in order to prevent a "failure or delay of justice" is for the court to determine in each case upon the facts presented. *Id.*
4. SAME.—Where witnesses for the defendants, whose testimony was material, resided hundreds of miles beyond the limits of the district in which the case was to be tried, and where the defendants were unable to pay the cost of bringing them to the place of trial, *held*, that the necessity for making an order for a *dedimus potestatem* to take their depositions sufficiently appeared. *Id.*

DEPOSITS. See *Bank*, 3.

DESCRIPTION OF PROPERTY. See *Mortgage*, 3.

DILIGENCE. See *Guaranty*, 3. *Officer*, 1, 2.

DISCLOSURE. See *Federal Courts*, 7.

DOUBLE LIABILITY. See *Contract*, 1.

DRAFT. See *Contract*, 3.

EJECTMENT.

1. EJECTMENT—TITLE OF PLAINTIFF—LAND CONTRACT.—A party who has paid part of the purchase money for land, and has made a contract with the owner that he may go into possession and cultivate the land and build thereon, and receive a deed therefor when the balance of the purchase money is paid, has sufficient title to maintain an action of ejectment. *Melenthin v. Keith*, 408

EMPLOYEE. See *Master and Servant*. *Negligence*, 4, 7, 8, 22.

EMPLOYMENT. See *Negligence*, 16, 17.

ENFORCEMENT OF LIEN. See *Admiralty*, 2, 3.

EQUITY. See *Patent*, 19. *Railroad*, 19.

1. BONA FIDE PURCHASER—CONSTRUCTIVE NOTICE—CONVEYANCE OF MORTGAGED PREMISES.—The holder of a mortgage surrendered the same upon the receipt of a quitclaim deed of the land from the mortgagor. The mortgagor, without knowledge of the mortgagee, had previously deeded the same land to his daughter, who, prior to the surrender of the mortgage by the mortgagee, and the conveyance of the mortgaged land by her father to the mortgagee, deeded the same to a third party, in consideration of certain promissory notes of doubtful value. *Held*, that if the conveyance of the daughter to the third party was without consideration, it should be set aside, and that the mortgage, which had been canceled in ignorance of the fact that the mortgagor had parted with the title, should be enforced against the land. It was the duty of the holder of the mortgage to examine the record for conveyances by the mortgagor before taking a quitclaim deed, and, as against a *bona fide* purchaser for value, he would be without remedy; but if the party claiming to be a *bona fide* purchaser for value is proven not to be such, he has no equities, and there is nothing to prevent a court of equity from disposing of this case upon the equities as they exist between the mortgagor and mortgagee. *Nickerson, Trustee, v. Meacham et al.*, 5

EQUITY — continued.

2. **BONA FIDE PURCHASER — PAYMENT BEFORE NOTICE OF EQUITIES — PROOF.**— A party relying upon the defense that he is a *bona fide* purchaser, entitled to hold, notwithstanding a prior equity, must establish his defense by proof. It is an affirmative defense. The statement of a consideration in the deed is not sufficient, but actual payment before notice must be shown. *Id.*
3. **PRESUMPTION AS TO VALUE OF PROMISSORY NOTES.**— As a general rule, the law will presume that a promissory note, even if past due, is worth its face in money; but this is only a presumption which arises in the absence of direct proof as to value, and may be overcome by comparatively slight proof in contradiction, especially when the paper is old, dishonored or outlawed. *Id.*
4. **PRE-EMPTION — GOVERNMENT PATENTS.**— By a joint resolution of April 10, 1869, congress provided that a *bona fide* settler upon certain lands known as the "Osage ceded lands," in Kansas, should have a right to purchase on certain terms. The defendant Snow was such a settler, and having the right to purchase under said joint resolution, he made the requisite proof and tender of the purchase money to complete such purchase. *Held*, that he was entitled to a patent from the government, and has an equity in the land and improvements thereon which he is at liberty to sell and convey. *Wallerton v. Snow et al.*, 64
5. **LOCAL LAND OFFICER.**— The refusal of a local land officer to receive the purchase money, on the ground that it was too late to give notice to others who were supposed to have an adverse claim, will not defeat such settler's rights. *Id.*
6. **RIGHTS OF SUBSEQUENT PURCHASERS.**— Where one holding an equitable title as above conveys that equity and gives up possession to another, who agrees to pay therefor when the grantor's equity shall have ripened into a legal title, such purchaser will not be allowed to make use of the possession so obtained to perfect a title in himself, and thus release himself from his liability to the party whose equity he has so purchased; and subsequent purchasers of land so acquired take whatever rights they have in the land, subject to the rights of the party in whom the equity thereto was first vested. *Id.*
7. **JURISDICTION — MARRIED WOMEN — SUIT BY CREDITOR AT LARGE TO SET ASIDE A MORTGAGE EXECUTED BY AN INSOLVENT DEBTOR, OR HAVE IT DECREED TO STAND AS A GENERAL ASSIGNMENT.**— Where a married woman doing business in her own name became insolvent, and together with her husband executed to A., one of her creditors, an instrument, purporting to be a mortgage, of all her separate property, to secure the payment of a debt she owed

EQUITY — continued.

him, and B., another of her creditors, whose demand had not been established at law, brought suit in equity to have the instrument set aside, or decreed to stand for a general assignment for the benefit of all the creditors, *held*, that B. could maintain his bill, and that the court had jurisdiction. *Dahlman v. Jacobs et al.*, 130

8. **HOMESTEAD LAWS—WIFE'S INTEREST.**—Under the homestead laws of Nebraska enacted in 1866, the wife had no vested interest in the homestead, and was, therefore, not a necessary party to any judicial proceedings relating to it. The supreme court of Nebraska has held that the homestead law in force when a contract is made is the one that shall govern in subsequent proceedings in reference thereto. *Spitley v. Frost et al.*, 43
9. **POWER OF THE COURT IN CASES AFFECTING HOMESTEADS.**—The court in which a case affecting the homestead is pending may exercise such power only as the parties before it might, in the absence of judicial proceedings, exercise over the subject matter. *Id.*
10. **RETROSPECTIVE LAWS.**—It is only where the intent of the legislature to make an act retrospective is plainly expressed, that courts will undertake to apply it to antecedent contracts, and determine whether it impairs their validity. *Id.*
11. **EXEMPTION LAWS—PERSONAL PRIVILEGES.**—The general doctrine is recognized that exemption laws are grants of personal privileges to debtors, which may be waived by contract or surrender, or by neglect to claim before sale. *Id.*
12. **CREDITOR'S BILL.**—A creditor at large, who has not established his demand at law, cannot maintain a suit in equity, either to set aside a conveyance executed by an insolvent debtor, or obtain a decree that such conveyance shall stand for a general assignment, under the state statutes, for the benefit of all such debtor's creditors. *Dahlman v. Jacobs et al.*, 130
13. **REMEDY AT LAW.**—A court of equity has no jurisdiction, even where the demand has been duly established, if the plaintiff can obtain a full, complete and adequate remedy at law. *Id.*
14. **JURISDICTION IN SUITS TO REMOVE CLOUDS UPON TITLES.**—A suit to remove a cloud upon a title cannot be maintained in a court of equity, where the plaintiff has a full, complete and adequate remedy at law. *Greenwalt v. Duncan et al.*, 133
15. **CROSS-BILL—RIGHTS OF DEFENDANT.**—The defendant in a suit to remove a cloud from a title to property in the plaintiff's possession has a right to file a cross-bill urging a superior title in himself, and to be fully heard; and if his title is found to be better than the plaintiff's, he is entitled to a decree in his favor, settling the whole controversy. *Id.*

EQUITY — continued.

16. Where a cross-bill is filed it should contain adequate averments to show title in the defendant. *Id.*
17. **HOW DEFECTS SHOULD BE TAKEN ADVANTAGE OF.**— Where the cross-bill does not contain the proper averments, the defect should be taken advantage of by demurrer. *Id.*
18. **SUIT TO QUIET TITLE — CROSS-BILL — RIGHTS OF DEFENDANT.**— The defendant in a suit in equity to remove a cloud from a title has a right to file a cross-bill, urging a superior title in himself; and, if his title is found to be better than the plaintiff's, he is entitled to a decree in his favor settling the whole controversy. *Greenwalt v. Duncan et al.*, 228
19. **MISTAKE.**— The mutual mistake against which equity relieves relates to something not within the contemplation of the parties in making their contract, and, therefore, not covered nor intended to be covered by it. If there is no misrepresentation or fraudulent concealment of a material fact, or a mistake, consisting in an unconsciousness, ignorance or forgetfulness of a material fact, the contract must stand. *Buckner v. Street*, 59
20. **MISREPRESENTATIONS — WHAT SUFFICIENT TO VOID CONTRACT.**— A contract may not be set aside on the ground of misrepresentation, unless it be of some material matter constituting some motive to the contract, something in regard to which reliance is placed by one party on the other, and by which he was actually misled, and not merely a matter of opinion open to the inquiry and examination of both parties. *Id.*
21. **BILL CHARGING FRAUD — INJURY RESULTING.**— The rule in equity is that it is not sufficient to charge a fraud simply, but the bill must charge also some injury as the result of the fraud; but this rule does not require any considerable damage, and a slight injury as the result of a fraud will give the party injured the right to bring his action and cancel the contract. *Linn v. Green*, 380
22. **FALSE REPRESENTATIONS AS TO INCUMBRANCE ON REAL ESTATE.**— Where a man represents that a piece of real estate is free and clear of incumbrance, when in fact it is subject to incumbrance, and induces another to take it upon the belief that his representations are true, there is an injury, and a bill so charging is sufficient on demurrer. *Id.*
23. **EXAMINATION OF RECORDS.**— In such a case the purchaser has a right to rely upon the representations of the grantor, and is not bound to search the records to find whether they are true or not. *Id.*
24. **LIMITATIONS.**— Although courts of equity, as a general rule, follow the statute of limitations, they do not do so when manifest wrong and injustice would result. *Fogg v. St. Louis, H. & K. Ry Co.*, 449

EQUITY — continued.

85. **LACHES — CORPORATIONS.**— Where a corporation conveyed all its assets, except its corporate franchise, to another corporation, and the latter assumed all the grantor's debts and took possession of its assets, and subsequently a creditor of the grantor, whose demand had accrued before said conveyance was executed, and was not yet barred by the statute of limitations, brought suit at law against said grantor, recovered judgment, and had an execution issued, which was returned *nulla bona*, and promptly after said return was made, but more than ten years after the original demand accrued, instituted proceedings in equity against his judgment debtor and its said grantee to force the latter to pay his demand, *held*, that the claim was neither barred by laches nor the statute of limitations. *Id.*

ESTATE.

1. **OF DECEASED — WIDOW'S PORTION OF REAL ESTATE.**— One-half in value of said real estate, secured to the widow by the statutes of Kansas, is equivalent to an undivided one-half before partition made. *Ferry v. Burnell et al.*, 1
2. **SAME — AUTHORITY OF WIDOW TO MORTGAGE.**— The widow may mortgage or convey her interest in said real estate, as an undivided one-half, before it is set apart to her by the probate court. *Id.*

ESTOPPEL. See *Corporation*, 2. *Land Grant*, 4. *Railroad*, 12.

EVIDENCE. See *Common Carrier*, 11. *Compromise*, 1. *Indictment*, 4. *Insurance*, 8. *Patent*, 23. *Pleading*, 3.

1. **WEIGHT OF.**— When there are written evidences made by the parties at the time the transactions occurred, these are entitled to more weight than contrary statements made subsequently, and after a litigation has sprung up. The jury are to judge of the evidence. *Foster v. Ohio-Colo. Reduc. & Mining Co.*, 329

EXAMINATION OF RECORD. See *Equity*, 23.

EXCEPTED PERILS. See *Common Carrier*, 2, 3, 12.

EXCEPTIONS. See *Practice*, 1.

EXECUTION OF PROCESS. See *Officer*, 1, 2.

EXEMPTION LAWS. See *Equity*, 11.

FACTOR.

1. **RIGHT OF SALE FOR ADVANCES.**— A factor who has made advances on the credit of the goods consigned to him for sale has a right to sell enough to reimburse his advances, unless restrained by some agreement with his consignor. *Fordyce, Assignee, v. Peper*, 231

FACTOR — continued.

2. **AGREEMENT TO HOLD FOR CERTAIN TIME.**— If a cotton factor for a sufficient consideration agrees to hold the cotton of a consignor until the opening of the market the next year, he is bound to do so; and if he sells the cotton before that time without the consent of the consignor, he is liable for the difference between the price at the time he sold, and the price at the time he was authorized to sell. *Id.*
3. **FRAUD OR GROSS NEGLIGENCE OF.**— A factor or other agent, who is guilty of fraud or gross negligence in the conduct of his principal's business, forfeits all claim to commission or other compensation for his services. *Id.*
4. **FALSE ACCOUNT OF SALES.**— Where a factor knowingly transmits to his consignor a grossly false and fraudulent account of sales, and does not enter the sales on his books until months after they were made, and then enters them falsely, no credit will be given to the factor or his books. *Id.*

FAILING CIRCUMSTANCES. See *Bank*, 2.

FALSE ACCOUNT OF SALES. See *Factor*, 4.

FALSE REPRESENTATIONS. See *Equity*, 22. *Fraudulent Representations*, 1, 2, 3, 4.

FEDERAL COURTS. See *Municipal Bonds*, 2. *Removal*, 5.

1. **UNITED STATES COURTS — ATTACHMENT PROCEEDINGS.**— R. § 915 — **PRIORITY.**— Under the provision of section 915 of the Revised Statutes of the United States, a circuit court administers the law of the state in which such court is held regarding attachments; and when property has been attached in a suit in the United States court by the marshal, and the sheriff has levied an attachment issued from a state court on the goods in the hands of the marshal, the priority of the lien of the attaching creditors is to be determined by the state law. *Bates et al. v. Days*, 242
2. **SAME — PROPERTY IN HANDS OF MARSHAL — ATTACHMENT FROM STATE COURTS.**— When writs issue from state and federal courts against the same property, the officer first obtaining possession, on being notified that a state court officer has a writ against the same property, should be offered all reasonable facilities to make a full return, and the officer holding the property should show in his return whatever was done by such state officer. *Id.*
3. **FEDERAL COURTS AND STATE COURTS NOT FOREIGN COURTS, OR IN HOSTILITY.**— Federal courts and state courts are not foreign courts, or in hostility to each other, in administering justice between litigants. The citizen of the state in the federal court

FEDERAL COURTS—continued.

cannot be deprived of any right he has in a state court, and the citizen of another state has the same claim to a debtor's property in the state where he resides as a resident, but no more. *Id.*

4. **JURISDICTION OF FEDERAL COURT—CITIZEN.**—To give jurisdiction to the federal courts on the ground of citizenship, all the plaintiffs who have an interest in the subject matter must have a different citizenship from the defendants. *Holland et al. v. Ryan*, 296
5. **SAME—FEDERAL LAWS.**—An averment that the action involves the "construction and consideration of the laws of the United States on the subject of mines and mining, and the validity and title to mining claims occurring and arising thereunder," held insufficient to show a cause of action arising under the laws of the United States. The complaint must state there is a controversy between the parties as to the meaning and effect of those laws. It is not sufficient that the right to recover is based upon an act of congress. *Id.*
6. **UNITED STATES COURT—ENFORCING REMEDIES GIVEN BY STATE LAW.**—The remedies given by state law to suitors in the state courts supplementary to writs of attachment for discovery of the debtor's property are applicable to suitors in the federal courts, and may be enforced at law or in equity, according as the state law provides. *Senter & Co. v. Mitchell*, 147
7. **SAME—DISCLOSURE OF DEFENDANT IN ATTACHMENT SUIT—PAYMENT TO MARSHAL.**—When a statute provides that if property to satisfy a writ of attachment cannot be found, the defendant in the writ may be summoned before the court to give information on oath respecting his property, and a defendant so summoned admits on his examination that he has money in his possession legally liable to seizure in payment of his debts, the court may order him to pay the same to the marshal holding the writ, or into the registry of the court, and obedience to such order may be enforced by the usual methods by which courts enforce obedience to their lawful commands. *Id.*
8. **CIRCUIT COURT—CHANCERY JURISDICTION—STATE STATUTE—NEW TRIALS.**—The statute of Nebraska, regulating the practice of the state court in determining applications for new trials, is not binding upon the circuit court of the United States when exercising its chancery jurisdiction; and the limitation in the state statute which forbids the state courts to grant new trials after one year, so far from being a limitation upon the circuit court, sitting in chancery, may be the very ground of its jurisdiction, especially where the facts which make it proper that the judgment should be set aside have been fraudulently secreted until the year has passed. *Tice v. School Dist., etc.*, 360

FEDERAL COURTS—continued.

9. **SAME**—**JURISDICTION, HOW CONFERRED.**—The chancery jurisdiction of the circuit court is conferred by the constitution of the United States and the acts of congress, and is not derived from or limited by state laws. The rules governing its exercise are the same in all the states, and are according to the practice of courts of equity in England, as contradistinguished from courts of law. *Id.*

10. **SAME**—**STATE STATUTES OF LIMITATIONS.**—Federal courts of equity usually follow by analogy state statutes of limitations, but they will not do so when the effect of such a statute in any case is to limit their general chancery jurisdiction; and although a state statute of limitations may make no exception in favor of a party who is prevented from suing by reason of a concealed fraud, they will enforce such an exception because it is a part of the chancery law as administered in those courts, which the state cannot change. *Id.*

FEE. See *Attorney's Fee*, 1. *Revenue*, 1.

FELLOW-SERVANT. See *Negligence*, 16.

FICTITIOUS PERSONS. See *Land Grant*, 1.

FINAL SETTLEMENT. See *Pleading*, 2.

FLOOD. See *Admiralty*, 11.

FORECLOSURE. See *Mortgage*, 5. *Railroad*, 4, 6.

FOREIGN COURTS. See *Federal Courts*, 3.

FRAUD. See *Equity*, 21. *Factor*, 3. *Fraudulent Conveyance*. *Fraudulent Representations*. *Laches*, 2. *Land Grant*, 1. *Patent for Land*, 1, 2.

FRAUDULENT CONVEYANCE.

1. **ATTACHMENT.**—Facts upon which an attachment was sustained, on the ground that defendant had disposed of his property to hinder and delay his creditors. *Senter & Co. v. Mitchell*, 147
2. **SAME**—**CONVEYANCE TO HINDER AND DELAY CREDITORS.**—A mortgage executed to hinder and delay the mortgagor's creditors, and which purposely exaggerates the mortgagee's demand, and the object of which is known to the mortgagee at the time of its execution, is void as against such creditors. *Stinson v. Hawkins*, 284

FRAUDULENT PREFERENCE. See *Assignment*, 4.

FRAUDULENT REPRESENTATIONS. See *Equity*, 22. *Patent for Land*, 1.

1. **RECKLESS STATEMENTS.**—A person is not at liberty to make positive assertions about facts material to a transaction, unless he knows them to be true; and if a statement so made is in fact false, the assertor cannot relieve himself from the imputation of fraud by pleading ignorance, but must respond in damages to any one who has sustained loss by acting in reasonable reliance upon such assertion. *Lynch et al. v. Mercantile Trust Co.*, 623
2. **WHAT INQUIRIES MUST BE MADE.**—The purchaser of land is entitled to rely upon the vendor's assertions about the boundaries and is not obliged to consult the recorded plat. *Id.*
3. **PRINCIPAL AND AGENT—IMPUTED FRAUD.**—A principal is liable for the reckless or otherwise fraudulent misrepresentations of his agent. *Id.*
4. **VENDOR CANNOT REPUDIATE CONTRACT.**—A purchaser is entitled to the benefit of his contract, and the vendor cannot purge himself of fraud in the transaction by offering to rescind, but is liable for the difference between the value of the property actually sold and the value of the property as represented. *Id.*

GARNISHMENT. See *Practice*, 5.

1. **GARNISHMENT.**—A judgment of a federal court is not attachable under process issued out of a state court. *Henry et al. v. Gold Park Min. Co.*, 70

GRANT. See *Land Grant*.

GUARANTY.

1. **WHAT CONSTITUTES.**—The defendant is agent of the plaintiff to sell machines. The contract entered into by the parties provides, among other things, that in case the machines are not paid for wholly in cash, the note of the purchaser for the unpaid balance shall be given, payable to the order of the plaintiff, "and shall be indorsed, and the collection thereof guaranteed, by the 'defendant,' waiving demand, protest, and notice of non-payment." The defendant is sued as guarantor of certain notes. The court, in charging the jury, *held*, that the defendant, by indorsing a note in compliance with the terms of the contract, became a guarantor. *Osborne v. Smith*, 487
2. **USUAL RULE AS TO LIABILITY OF GUARANTOR.**—Ordinarily, to render a guarantor liable, the execution against the principal debtor must have been returned *nulla bona*. *Id.*
3. **PRIMA FACIE DILIGENCE—JUDGMENT IN JUSTICE'S COURT—RULE.**—A judgment obtained against the principal debtor in a justice court, although not recorded so as to become a lien

GUARANTY — continued.

on real estate, is *prima facie* evidence of due diligence. When the debt itself can only be collected in the justice court, a creditor is only bound to proceed by suit, obtain judgment and issue execution. Such evidence will be overthrown by showing that the principal debtor had real estate which might have been secured by recording the justice court judgment. *Id.*

4. **RULE AS TO SOLVENCY.**— To be solvent, one must have property out of which his debts can be collected. A guarantor cannot require that suit be first brought against the principal debtor, if the latter is insolvent. *Id.*

5. **CHATTEL MORTGAGE—SUBROGATION OF GUARANTOR.**— A creditor is not required to resort to a chattel mortgage given by the principal debtor before suing the guarantor of the debt. Should the guarantor pay the debt, he would be entitled to be subrogated to the rights of the creditor against the debtor. *Id.*

HARBOR. See *Insurance*, 2.

HAZARD. See *Negligence*, 13.

HIGHWAY. See *Railroad*, 12.

HOMESTEAD. See *Equity*, 8, 9.

INCUMBRANCE. See *Equity*, 22.

INDEBTEDNESS—CERTIFICATES. See *Railroad*, 1.

INDICTMENT.

1. **STATUTORY OFFENSE.**— Where sections 5485 and 4785 of the Revised Statutes must be construed together in order to constitute the offense charged in the indictment, and section 4785 has been repealed before the commission of the offense alleged, by a subsequent amendment thereto, it is wholly inadmissible, in dealing with the criminal provisions of section 5485, to extend them by construction to the future acts of congress, when, by the express words of the section, its provisions are confined to the then existing pension law, of which the amended section was a part. *United States v. Jenson*, 84

2. **INSTRUMENT ENTERING INTO THE GIST OF THE OFFENSE SHOULD BE SET OUT—EXCEPTIONS TO RULE.**— A bill of indictment for depositing for mailing a notice of where an article for the prevention of conception may be obtained should set out the notice, unless it cannot be copied without great inconvenience, or is so obscene as to be unfit to go upon public records. *United States v. Kaltmeyer*, 260

3. Where there is any reason for a failure to set the notice out, apparent upon the face of the papers or of the indictment, the court will consider it. *Id.*

INDICTMENT — continued.

4. EVIDENCE. — Where there has been a failure, without excuse, to set the instrument out in the indictment, it will not be admissible in evidence. *Id.*
5. SENDING LETTER THROUGH THE MAIL TO CREDITOR WITH INTENT TO DEFRAUD — R. S. § 5480. — An attempt to defraud a creditor by inclosing with a letter to him worthless slips of paper in place of money, stated by such letter to be inclosed therewith, and sending such letter and inclosed slips to such creditor through the mail, is not an indictable offense under section 5480 of the Revised Statutes. *United States v. Owens*, 307

INFORMER. See *Revenue*, 1.

INFRINGEMENT. See *Patent*, 8, 17, 21, 25.

INJUNCTION. See *Patent*, 1, 3, 5, 18. *Removal*, 7.

INJURY. See *Equity*, 21. *Negligence*.

INNKEEPERS.

1. LIABILITY OF INNKEEPERS FOR THEFT OF MERCHANDISE FOR SALE — R. S. MO. § 5785. — Section 5785 of the Revised Statutes of Missouri does not apply to articles of gold manufacture kept by a guest for sale. *Fisher et al. v. Kelsey et al.*, 135
2. SAME — R. S. MO. § 5786. — Where a statute provides that no innkeeper shall be liable for the loss of any merchandise for sale or sample belonging to a guest, unless the guest shall give him written notice of having such merchandise for sale or sample in his possession after entering the inn, and furthermore provides that the innkeeper shall not be compelled to receive guests with merchandise for sale or sample in their possession, a notice in writing is absolutely necessary to fix an innkeeper's responsibility, and he waives nothing by admitting a guest whom he knows has merchandise for sale or sample in his possession. *Id.*
3. SAME — COMMON LAW LIABILITY. — Whether the common law liability of innkeepers extends to merchandise for sale or sample, *quære*. *Id.*

INNOCENCE. See *Contempt*, 2.

INSOLVENCY. See *Bank*, 1, 2, 3. *Equity*, 7.

INSTRUCTIONS. See *Jury*, 1.

INSURANCE. See *Common Carrier*, 6. *Damages*, 1.

1. MUTUAL BENEVOLENT SOCIETY — FAILURE TO PAY DUES. — Where a certificate of membership, in the nature of a life policy, issued by a mutual benevolent society, provided that the amount of insurance therein specified should be paid in case of the mem-

INSURANCE.—continued.

ber's death to his beneficiary, on condition that he had "complied with the by-laws of the society," and the by-laws provided that members should forfeit their membership if they failed to pay their dues within thirty days after publication of an assessment, and it appeared from the evidence that the assured had failed to pay an assessment within the time specified, and that it remained unpaid at the time of his death, *held*, that he had forfeited his membership, and that there could be no recovery under his certificate. *Madeira v. Merchants' Exch. Mut. Ben. Soc.*, 258

2. "FROM ST. LOUIS TO NEW ORLEANS"—LOSS IN HARBOR.—Where goods insured "from St. Louis to New Orleans" are lost while being transported from East St. Louis to St. Louis, preparatory to a final start, by the carrier which has undertaken to transport them to New Orleans, the loss is within the terms of the policy; for the purpose of such a case, the harbor of St. Louis ought to be regarded as extending to the opposite shore. *Sun Mutual Ins. Co. v. Miss. Valley Transp. Co.*, 478
3. EVIDENCE.—In this suit the policies of insurance were not introduced in evidence, and secondary evidence in lieu thereof was admitted without objection except in one instance, and the fact of insurance was apparently taken for granted. At the hearing in this court it was for the first time objected that the libelants were not entitled to recover because they had failed to show that the goods lost were insured. *Held*, that, under the circumstances of the case, the objection should be overruled. *Id.*
4. CORPORATIONS—STOCKHOLDERS HAVE INSURABLE INTEREST.—A stockholder in a private corporation has an insurable interest in the corporate property. *Seaman v. Enterprise F. & M. Ins. Co.*, 558
5. MUTUAL ASSOCIATION POLICY—HOW ENFORCED—PRACTICE.—Where a policy of insurance issued by a mutual association does not fix upon the association an absolute liability to pay any particular sum, but only a liability to pay the proceeds of a particular assessment to be levied in a particular way, not to exceed a certain sum, and further provides that the association shall only be liable in a proceeding to compel it to make the assessment, an action at law to recover the maximum amount named in the policy cannot be maintained. *Eggleston v. Centen Mut. L. Ass'n*, 484
6. The only remedy in case of the assured's death is by a proceeding in chancery to compel a specific performance. *Id.*

INTENTION. See *Contract*, 5, 6, 7, 8.

INTERSTATE COMMERCE. See *Railroad*, 24.

INTIMIDATION. See *Public Lands*.

INVENTION. See *Patent*.

INVENTOR. See *Patent*, 2.

JUDGMENT. See *Corporation*, 1, 7. *Garnishment*, 1. *Guaranty*, 3. *Practice*, 6. *Railroad*, 12. *Service*, 1.

JURISDICTION. See *Admiralty*, 7, 8, 9, 10, 11. *Equity*, 7, 14. *Federal Court*, 4, 5, 8, 9. *Patent*, 19. *Removal*, 5. *Revenue*, 1.

1. CIRCUIT COURT—ACT OF MARCH 3, 1875.—An assignee of a non-assignable cause of action cannot maintain a suit thereon before a circuit court where his assignor could not have done so. *Northern Ins. Co. v. St. Louis & S. Ry Co.*, 126
2. SAME—ASSIGNMENT OF CAUSES OF ACTION ARISING ON TORTS.—The act of 1875 does not abrogate the common law rule as to assignment of causes of action arising on torts. *Id.*
3. CIRCUIT COURT—RESTRAINING PROCEEDING IN STATE COURT.—A bill to restrain the sheriff of a county in the execution of process of a county court of co-ordinate jurisdiction with the circuit court of the United States, or to restrain the execution of a deed in pursuance of a sale under such execution, cannot be maintained in the circuit court; but when the parties to whom such deed would go are before the court, the court may deal with them and dismiss the bill as to the sheriff. *White, Agent, v. Crow*, 810
4. SAME—SETTING ASIDE SALE.—The circuit court has not jurisdiction to set aside a sale made in the court of the state, with a view of ordering another sale, because the sale was not made pursuant to the statute, and the party claiming such sale to be void must proceed in the state court. *Id.*
5. CHANGE OF RESIDENCE DEPENDENT UPON INTENTION.—Whether a man has changed his residence from one state to another, so as to have become a citizen of the latter, must depend very largely upon his intention. The mere fact of a prolonged absence from one state, and continued residence in another while attending to business or pleasure, is not in itself enough to constitute a change of citizenship; it must appear that the person has left the former state with the intention of resigning his citizenship there. The fact that a man continues to vote in the state from which he came, and owns a farm there, tends to show that he is a citizen thereof. *Woodworth v. St. P. M. & M. Ry Co.*, 574

JURY. See *Negligence*, 17.

1. **PEREMPTORY INSTRUCTIONS.**—The rule in federal courts is that if the court be of opinion that, upon the evidence as it is presented, a verdict one way or another would have to be set aside on motion for new trial, on the ground that it is not supported by the evidence, the court is not bound to submit the question to the jury, but may charge the jury in accordance with the view the court takes of the proof. The court is not bound to go through the form of submitting a case to the jury when satisfied in advance that in case the jury find one way the verdict will be set aside. *Adams v. Spangler*, 334

JUSTICE'S COURT. See *Guaranty*, 3.

LACHES. See *Equity*, 25. *Land Grant*, 3. *Mortgage*, 5. *Pleading*, 1. *Railroad*, 5.

1. **STATUTE OF LIMITATIONS — CONCEALED FRAUD.**—It is well settled that where the facts alleged in the bill disclose laches on the part of the complainant, the court will refuse relief on its own motion, even where the defense of laches is not pleaded. *Sullivan v. Portland, etc. R. Co.* 94 U. S. 806. *Board of Comm'rs of Leavenworth Co. v. C. R. I. & P. Ry Co.*, 503
2. **DEFENSE OF LACHES ON THE GROUND OF FRAUD.**—To take advantage of the exception provided for in a case of concealed fraud, where otherwise a party would be barred by reason of his laches or the statute of limitations, it must be made to appear that the fraudulent transaction from which relief is prayed was one which concealed itself, or at least the allegations and proof must be such as to satisfy the court that the complainant could not have known of the facts constituting the fraud by the exercise of proper diligence and care. *Id.*
3. **WHAT DEEMED TO BE NOTICE.**—Whatever is sufficient to excite attention and put the party on his guard and call for inquiry is notice of everything to which this inquiry would have led. When a person has sufficient information to lead him to a fact he shall be deemed conversant with it. *Martin v. Smith*, 1 Dill. 96. *Id.*
4. **MISSOURI STATUTE OF LIMITATIONS.**—Section 3230, St. Mo. 1879, providing that actions for relief on the ground of fraud shall be commenced within five years from the time when the cause of action accrues, "the cause of action to be deemed not to have accrued until the discovery by the aggrieved party, at any time within ten years, of the facts constituting the fraud," commented upon and approved by the court. *Id.*

LAND. See *Public Land*.

LAND CONTRACT. See *Ejectment*, 1.

LAND GRANT.

1. LAND GRANTS AND GOVERNMENT PATENTS — FRAUD — GRANTS TO FICTITIOUS PERSONS.— It is necessary to the validity of a deed that the grantee should be capable of taking title. A grantee being as necessary to the conveyance of land as a grantor, it follows that a grant to a fictitious person is void; and a patent for land to a fictitious person not in existence carries no title, and invests no interest in any one. *United States v. So. Colo. Coal & Town Co. et al.*, 563
2. SAME — BONA FIDE PURCHASERS FOR VALUE.— The claim for protection by *bona fide* purchasers of land, for which patents have been obtained by fraud, can only be maintained by showing that the legal title has passed to them; but in a case where the original patents are void, and consequently the title never passed, the doctrine of *bona fide purchasers for value*, and without notice of fraud, cannot be invoked. On the principle that a grantor can convey no more than he possesses, he who comes in under the holder of a void grant can acquire nothing. *Id.*
3. SAME — LACHES ON THE PART OF THE GOVERNMENT.— One of the limitations to the general rule that when the government becomes a party to a suit in its own courts it stands upon the same footing as individuals, and must submit to the law as administered between man and man, is that neither the defense of the statute of limitations nor that of laches can be pleaded against the United States. *United States v. Beebe*, 17 Fed. Rep. 36, distinguished. *Id.*
4. SAME — EQUITABLE ESTOPPEL.— *Held*, not to apply, the respondents not being innocent purchasers within the meaning of the rule, and for the further reason that the government cannot be estopped by the frauds or crimes of its public officials. *Id.*

LAWS. See *Equity*, 10, 11. *Federal Courts*, 5. *Navigable Streams*.

LEASE.

1. COVENANT OF.— The execution of a lease for real estate implies a covenant to lessee for quiet enjoyment during the term. *Owens v. Wright*, 642
2. REMEDY OF LESSEE.— In case of entry upon the demised premises by the lessor during the term, the remedy of the lessee is in damages by suit at law for breach of covenant, and not by action in equity for an accounting. *Id.*

LEGALITY. See *Municipal Bonds*, 8.

LETTER. See *Indictment*, 5.

LETTER OF CREDIT. See *Contract*, 2.

LETTERS PATENT. See *Patent*.

LIABILITY. See *Common Carrier*, 5, 6, 18. *Corporation*, 1. *Guaranty*, 2. *Innkeepers*, 1, 2, 8. *Master and Servant*, 1. *Railroad*, 19. *Telegraph*, 1, 8.

LICENSE. See *Patent*, 18.

LIEN. See *Admiralty*, 1, 2, 8, 4, 5, 10. *Equity*, 4. *Railroad*, 19, 20.

LIMITATION. See *Admiralty*, 8. *Common Carrier*, 18. *Corporation*, 2. *Equity*, 24. *Federal Court*, 10. *Laches*, 1, 4. *Railroad*, 12. *Statute of Limitations*.

LOCAL INFLUENCE. See *Removal*, 1.

LOCAL LAND OFFICER. See *Equity*, 5.

LOCATION. See *Mining*, 2, 8, 4.

LOCATOR. See *Mining*, 2.

LODE. See *Mining*, 1.

LOSS. See *Insurance*.

MACHINERY. See *Master and Servant*, 1. *Negligence*, 15.

MAIL. See *Indictment*, 5.

MANDAMUS. See *Municipal Bonds*, 1. *Practice*, 2.

MARRIED WOMEN. See *Equity*, 7.

MARSHAL. See *Federal Courts*, 2, 7.

MASTER AND SERVANT. See *Negligence*, 5, 17.

1. **DEFECTIVE MACHINERY — LIABILITY OF MASTER FOR PERSONAL INJURY TO SERVANT.**— Where a master has expressly promised to repair a defect in the machinery used by the servants in his employment, the servant may recover for an injury caused thereby within such a period of time after the promise as would be reasonable to allow for its performance. *Parody v. Chicago, M. & St. P. Ry Co.*, 88

2. **PROMISE BY AGENT OF MASTER.**— A promise to repair made by the agent of the master is binding on the master, but the burden of proof is on the plaintiff to establish such promise. *Id.*

3. **MEASURE OF DAMAGES.**— The award of damages in such cases must not be excessive. They are only to be remunerative,— compensatory,— a just and fair amount for the injury sustained. *Id.*

4. **RESPONSIBILITY OF MASTER FOR ACTS OF VICE-PRINCIPAL.**— If the master, or another servant standing towards the servant injured in the relation of superior or vice-principal, orders the latter into a situation of greater danger than, in the ordinary course of his duty, he would have incurred, and he obeys and is thereby

MASTER AND SERVANT—continued.

injured, the master is liable, unless the danger is so apparent that to obey would be an act of recklessness. *Miller v. Union Pac. Ry Co.*, 300

5. **WHO IS A VICE-PRINCIPAL.**—Where a master employs one servant and requires him to work under the orders of another, and gives the latter power to dismiss the former at his pleasure, the latter is a superior servant or vice-principal, and stands in the place of the master when acting in the scope of his powers. *Id.*

MEASURE OF DAMAGES. See *Common Carrier*, 10. *Factor*, 2. *Mining Claim*, 3. *Negligence*, 20, 21. *Officer*, 3.

MINING.

1. **LODE OR PLACER MINE**—R. S. § 2333.—The “vein or lode” of mineral referred to in section 2333 of the Revised Statutes as exempt from a grant or patent of premises in which such vein or lode may be embraced, means a vein or lode that has been discovered, developed, or located, and that has definite metes and bounds. *Iron Silver Mining Co. v. Sullivan et al.*, 374
2. **LOCATOR DISPOSING OF PART.**—After a mining claim has been properly located, the owner of it may sell any part without prejudice to his right to hold the remainder. He may dispose of it by gift or grant in any way that seems proper to him, and the mere fact that a part of it is transferred to another will not defeat the right of the locator to other portions which were not so sold, disposed of, or surrendered. *Little Pittsburg Consol. Min. Co. v. Amie Min. Co.*, 293
3. **PREVIOUS LOCATION.**—A location of a mining claim cannot be made by a discovery shaft upon another claim which has been previously located, and which is a valid location. *Id.*
4. **Essentials and extent of a valid location.** *Terrible Mining Co. v. Argentine Mining Co.*, 639

MISREPRESENTATIONS. See *Fraudulent Representations*, 1, 2, 3, 4. *Equity*, 20.

MISTAKE. See *Equity*, 19.

MORTGAGE. See *Equity*, 1, 2, 7. *Estate*, 2. *Guaranty*, 5. *Pledge. Railroad*, 8, 4.

1. **PRIORITY OVER UNRECORDED DEED.**—A recorded mortgage of the widow's interest in real estate of which the husband died seized takes precedence of a prior unrecorded deed made by the husband and wife in his life-time, and of which the mortgagee had no notice. *Ferry v. Burnell et al.*, 1
2. **CROPS TO BE GROWN.**—In Arkansas, crops to be grown may be mortgaged, and the lien attaches as soon as they are produced. *Senter & Co. v. Mitchell*, 147

MORTGAGE — continued.

8. **DESCRIPTION OF PROPERTY.**— A mortgage which described the property mortgaged as "thirty bales of good lint cotton, the first picking of our crop of 1882, to average four hundred and fifty pounds each," describes the cotton with sufficient certainty.

Id.

4. **APPOINTMENT OF RECEIVER FOR PROTECTION OF MORTGAGEE.**—

It must clearly appear, before a receiver of rents and income will be appointed for the protection of the mortgagee, that the mortgagor is hopelessly insolvent and the property inadequate security for the debt. *Cone v. Combs*, 651

5. **LACHES OF MORTGAGEE — FAILURE TO ENFORCE DECREE OF FORECLOSURE.**— Where the mortgagee delays his suit for foreclosure and permits the mortgagor to use the property for several years, a very strong case of probable injury to the rights of the mortgagee must be made out, and there must be a pressing necessity for the interposition of the court; and if a decree has been rendered and a sale ordered, and the mortgagee still neglects to have it enforced, the emergency must be grave, and an imperative necessity for the relief be shown to exist, before a court will exercise this extraordinary jurisdiction. *Id.*

MOVABLES. See *Admiralty*, 10.

MUNICIPAL BONDS.

1. **RECITALS THEREIN — MANDAMUS.**— Suit was brought upon certain county bonds which recited upon their face that they had been issued under the provisions of the charter of a railroad company. The petition stated that they had been issued under the provisions of the General Statutes of the state. The bonds were duly filed in the case, and judgment was obtained by default. *Mandamus* proceedings were thereupon instituted to enforce the judgment, and an alternative writ was issued commanding the county court to levy a special tax *sufficient to pay it*. Under the laws of the state it was the duty of the county court to levy such a tax, where the bonds were issued as alleged in the petition, but they could only levy a tax of one-twentieth of one per cent. per annum, where they were issued as recited in said bonds. The return to the writ stated that the bonds had been issued under the charter of the railroad company, and that the lawful taxes had been levied. Upon motion to quash the return, *held*, that the bonds were a part of the record for the purpose of determining the measure of taxation to be enforced, and that the presumption was that the recitals therein were true, in the absence of evidence that such recitals were the result of mistake or inadvertence. *United States ex rel. Harshman v. County Court*, 76

MUNICIPAL BONDS—continued.

2. POWER OF FEDERAL COURTS OVER STATE OFFICERS.—In such proceedings federal courts can only require state officers to enforce state laws. *Id.*
8. PRESUMPTION IN FAVOR OF LEGALITY.—*Semble*, that where the constitutionality of a law under which county bonds have been issued is doubtful, federal courts will, in advance of any consideration of the subject by the supreme court of the state or of the United States, resolve all doubts in favor of the validity of the act. *Shelley v. St. Charles Co.*, 474

MUNICIPAL CORPORATIONS. See *Corporation*, 2.NATURALIZATION. See *Alien*, 1.

NAVIGABLE STREAMS.

1. STATE LAWS.—Statutes passed by the states for their own uses, declaring small streams navigable, do not make them so within the meaning of any constitutional provision, treaty or ordinance of the United states. *Duluth Lumber Co. v. St. Louis Boom and Imp. Co.*, 382

NEGLIGENCE. See *Admiralty*, 6. *Common Carrier*, 5, 7, 8, 9, 12. *Factor*, 8. *Railroad*, 18, 14, 17. *Telegraph*, 1, 4, 5.

1. WHETHER A QUESTION OF LAW OR FACT—VISIBLE AND OBVIOUS DANGER—CONTRIBUTORY NEGLIGENCE.—Under the circumstances of this case, whether the railroad company was guilty of negligence in allowing a telegraph pole to remain so near to its track that an employee, while in the discharge of his duty, was injured by colliding therewith, is a question for the jury, and the demurrer should be overruled. *Hall v. U. P. Ry Co.*, 257
2. PERSONAL INJURY—CONTRIBUTORY NEGLIGENCE.—An employee of a railroad company, while in the discharge of his duties, attempted to board an approaching engine by standing in the middle of the track and stepping onto the rear foot-board; but in the attempt failed, and was run over, receiving fatal injuries. *Held*, upon motion to set aside a verdict rendered in favor of administratrix, that, although the foot-board and rear hand-rail of engine were out of repair, the deceased had so clearly been guilty of gross contributory negligence, that the verdict should be set aside. *Cunningham, Adm'x, v. C., M. & St. P. Ry Co.*, 465
3. SAME—VOLUNTARILY ASSUMING A POSITION OF DANGER.—If a man voluntarily and unnecessarily puts himself into a dangerous position, when there are other positions that he may take, in connection with the discharge of his duty, that are safe, he

NEGLIGENCE — continued.

cannot recover damages for that injury to which he has contributed by his own negligence. *Id.*

4. SAME — CONTRIBUTORY NEGLIGENCE — RAILROAD EMPLOYEES.— In cases of unexpected and immediate danger, calculated to affect the judgment of him who is to meet it, a mistake made in his movements is not negligence. *Stevenson v. Chicago & A. R. Co.*, 634
5. SAME — ACTS OF CO-SERVANTS.— The acts of the plaintiff's co-servants *held*, for the purposes of this case, and to determine whether the plaintiff was guilty of contributory negligence, to be the acts of the plaintiff. *Id.*
6. SAME — CONTRIBUTORY NEGLIGENCE.— Plaintiff, intending to cross the railroad where there were three or four tracks, looked east and west for approaching trains, and saw a freight train coming from the west on the second track; waited for that to pass, and immediately thereafter crossed onto the next track, and on stepping thereon was run over by a passenger train coming from the east, and was injured. The view to the east was uninterrupted for one thousand five hundred to one thousand six hundred feet, and if the plaintiff had looked to the east after the freight train had passed he must have seen the passenger train. No whistle was sounded nor bell rung, nor other signals given. *Held*, that though no signals were given, the plaintiff was guilty of such contributory negligence that his right to recover would be thereby defeated. Following *Railroad Co. v. Houston*, 95 U. S. 697, and *Schofield v. Railroad Co.* 2 McCrary, 268 (S. C. 8 Fed. Rep. 488). *Holland v. C., M. & St. P. Ry Co.*, 549
7. SAME — PROTECTION OF EMPLOYEE BY EMPLOYER.— While it is true that an employee, while working in a dangerous place, where he is required to give his attention to the work in hand, is entitled to rely on the fact that the employer, knowing such to be the fact, will exercise due care and diligence to protect his employee from danger not directly arising from said work, yet this rule will not apply in the case of an employee who, walking across a track to get his tools, is run over by an approaching train, for the reason that, the act of walking being automatic, it is not such an act as would engross a man's attention to such an extent that with ordinary care and diligence he would not see or hear an approaching train. Construing *Goodfellow v. Railroad Co.* 106 Mass. 461. *Id.*
8. SAME — CONTRIBUTORY NEGLIGENCE — DUTY OF RAILROAD COMPANIES TO EMPLOYEES.— Railroad companies are not insurers of the life and limb of their employees, and the duty and obligation which the law exacts from a railroad company towards

NEGLIGENCE — continued.

its employees is not as high as that towards its passengers. Ordinary care is the rule which is applied to a railroad company with regard to its duties towards its employees. Under this rule is the obligation to keep its machinery and all other things used in the operation of the road in proper order and repair, so that its employees will not be injured by reason of any defects in such machinery or working apparatus. *Woodworth v. St. P., M. & M. Ry Co.*, 574

9. **SAME — CONTRIBUTORY NEGLIGENCE — VOLUNTARILY ASSUMING A POSITION OF DANGER.**—The plaintiff was employed by the defendant railroad company in excavating, and was sent with others to the place of work on an engine provided by the company for that purpose. The tender being full of wood, he, with one or two others, sat on the front of the engine, with his feet over the pilot. While proceeding to his work in that position, the engine on which he was riding ran into another engine, and the plaintiff received the injuries for which he seeks damages. On motion to the court to instruct the jury to find a verdict for the defendant, upon the ground, with others, that the evidence showed contributory negligence which would bar a recovery, the court, following the law as laid down by the supreme court in *Railroad Co. v. Jones*, 95 U. S. 439, held, (1) that the plaintiff himself so far contributed to his injury by his own negligence and want of ordinary care and caution in placing himself in such a dangerous position on the engine of the defendant, that he could not recover; and (2) that voluntarily placing one's self in a position of known danger is such contributory negligence as to prevent recovery for injury sustained on account of being in such position; and the plaintiff being of age, and able to see and know the risks of the position, even the fact that he had been thereto invited and authorized by the defendant would not justify him in his negligence in placing himself in a position of apparent great risk and danger. *Kresanowski v. Northern Pacific R. Co.*, 528
10. **SAME — PLEADING.**—A complaint in an action to recover damages for personal injuries caused by the negligence of an employer to an employee should clearly state facts sufficient to make it appear to the court what the act of negligence that caused the injury was. *Simpson v. La Plata Min. & S. Co.*, 327
11. **SAME — BURDEN OF PROOF.**—The law does not presume or impute carelessness or negligence, but requires it to be shown by him who alleges it, and unless he does show it he cannot recover. *Mentzer v. Armour et al.*, 617
12. **SAME — CARPENTERS — RISKS ATTENDING THE TRADE.**—A carpenter engaging himself as such is bound to know, and he

NEGLIGENCE — continued.

- assumes, the ordinary dangers of his calling, and must exercise prudence and caution accordingly. *Id.*
13. SAME — OVERSEERS — CARE IN SELECTING. — In employing overseers or superintendents ordinary care and prudence must be used in ascertaining their qualifications and fitness; but the law presumes that self-interest is a sufficient stimulant in the ascertainment of the suitableness of an overseer, and therefore the burden of proof is with him who alleges the unfitness. *Id.*
14. SAME — SETTLEMENTS OF CLAIMS FOR DAMAGES. — The law favors settlements between those claiming damages for personal injuries and those who may be the cause of the same; but if such settlements are induced by false representations, or when the injured party is not possession of his proper senses, they must be regarded as a nullity. *Id.*
15. PERSONAL INJURY — DEFECTIVE MACHINERY — RESPONSIBILITY. — The plaintiff sues to recover for injuries received while working on the defendants' elevator, and avers that certain portions of the elevator were defective. *Held*, that, to render the defendant liable, it must be shown that the portions claimed to be defective were necessary for the safe operation of the elevator; that they caused or contributed to the injury received; and that they were not repaired within a reasonable time after being brought to the defendants' notice. *Johnson v. Armour et al.*, 629
16. SAME — FELLOW-SERVANTS — MASTER'S RESPONSIBILITY — COMMON EMPLOYMENT. — A master is not liable for an injury resulting to a servant through the negligence of a fellow-servant, not even though the fellow-servants are incompetent, unless such incompetency was known to the master, or might have been ascertained by the exercise of ordinary care; nor will the master be liable in any case, unless the incompetency caused, or contributed to, the injuries received. Common employment means work of the same general character. *Id.*
17. SAME — SCOPE OF EMPLOYMENT — QUESTION FOR THE JURY. — A master is not liable for an injury sustained by a servant while performing work not in the line of his trade, and which he was not ordered to do. The question whether one is working in the line of his trade is for the jury. *Id.*
18. SAME — RISKS OF BUSINESS. — An employee cannot recover for an injury resulting from one of the usual risks or hazards connected with the business into which he has entered, and which the law will consider he assumed when undertaking the duties of the position. *Woodworth v. St. P., M. & M. R. Co.*, 574
19. CONTRIBUTORY NEGLIGENCE — BURDEN OF PROOF. — That for any neglect of the plaintiff after the injury sustained, causing addi-

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tional damage to himself, the defendant would not be liable. The burden of proving contributory negligence on the part of the plaintiff is upon the defendant. *Secord v. St. P., M. & M. Ry Co.*, 516

20. **INJURY CAUSING DEATH—MEASURE OF DAMAGES*UNDER IOWA STATUTE.**—Under the statute of Iowa giving to the legal representatives of a person killed by the negligence of another, a right of action to recover damages therefor, the measure of damages is the sum necessary to compensate the estate of the deceased for the loss occasioned by his death. The facts and circumstances which may be considered by the jury, stated. *Kelley, Adm'r, v. Cent. R. of Iowa*, 658
21. **MEASURE OF DAMAGES.**—That in estimating damages the jury should consider the loss of time and the suffering caused the plaintiff in the past, and that which will probably be caused him by the injury in the future; also, the injury to his health and bodily strength, including in the latter the effect the injury might have had upon his ability to labor, both in the past and in the future. *Kresanowski v. Northern Pacific R. Co.*, 528
22. **NEGLIGENCE OF CO-EMPLOYEES.**—The engineer in charge of a steam shovel and a workman engaged with the said machine are co-employees, and if the latter is injured by reason of negligence or want of prudence on the part of the former, there can be no recovery. *Thompson, Adm'r, v. Chi. M. & St. P. Ry Co.*, 542
23. **SAME—KNOWLEDGE OF SUPERIOR OFFICER.**—Where it is claimed that an employee is injured by negligence or carelessness on the part of his superior officer, it must be shown affirmatively that the superior was in possession, or might by the exercise of ordinary care, prudence or intelligence have been in possession, of knowledge as to the dangerous character of the work, which knowledge was unknown, and by the exercise of ordinary care, prudence and intelligence on the part of the employee could not have been known, to said employee. *Id.*

NEW TRIAL. See *Federal Courts*, 8.

1. Motion for a new trial in a case tried before the district judge will be heard by the circuit judge only on request of the former, and not as a matter of right to the unsuccessful party. *Adams v. Spangler*, 336
2. **POWER OF CHANCERY COURT TO DECREE.**—It is a general principle of law that a court of chancery may decree a new trial after the courts of law are barred by lapse of time from so doing. *Tice v. School Dist., etc.*, 360

NON-RESIDENT. See *Alien*, 2. *Service*, 4.

NORTHWESTERN TERRITORY.

1. NORTHWESTERN TERRITORY—ORIGINAL ACT—EFFECT OF ADMISSION OF STATE.—The original ordinance concerning the northwestern territory ceased to be of any force when congress, and a state organized out of such territory, chose to organize and admit such state into the Union. *Duluth Lumber Co. v. St. Louis Boom & Improvement Co.*, 882

NOTE. See *Attorney's Fee*, 1. *Corporation*, 3. *Equity*, 3. *Pledge*.

NOTICE. See *Equity*, 1, 2. *Laches*, 3. *Service*, 5.

OBSTRUCTION. See *Admiralty*, 8, 9.

OFFENSE. See *Indictment*, 1, 2.

OFFICER. See *Municipal Bonds*, 2.

1. RESPONSIBILITY OF, IN EXECUTING PROCESS.—The rule is that the sheriff to whom a valid process is issued is bound to exercise ordinary skill and diligence in its execution, and in case of his neglect in this regard is liable for any damages which the party interested may have sustained in consequence of such neglect. *Adams v. Spangler*, 834
2. ORDINARY DILIGENCE.—In case of an attachment placed in the hands of a sheriff to levy, it is not the exercise of ordinary diligence for the sheriff to take the representation of the defendant in attachment as to the value of goods seized thereunder. And in such case, when it appears that there were in the possession of defendant goods amply sufficient to satisfy the sum named in the attachment, and the sheriff, relying upon the representation of defendant, fails to levy upon a sufficient quantity, he will be held responsible for such failure. *Id.*
3. MEASURE OF DAMAGES.—In such case, when it appears that the defendant in attachment is insolvent, the measure of damages will be the difference between the amount named in the attachment, with costs, and the amount realized from sale of the goods seized—the actual damage sustained. *Id.*

OFFICER—SUPERIOR. See *Negligence*, 13, 23.

OPTION. See *Contract*, 5, 6, 7, 8.

ORDERS. See *Railroad*, 8. *Res Adjudicata*.

OVERSEER. See *Negligence*, 13.

PARTNERSHIP. See *Pleading*, 3.

PART PAYMENT. See *Corporation*, 8.

PASSENGER. See *Common Carrier*, 7, 8, 9. *Railroad*, 16, 17, 18.

PATENT.

1. EFFECT OF DECISIONS AS TO VALIDITY — PRELIMINARY INJUNCTION.

Where a motion is made for a preliminary injunction for an alleged infringement of a patent, which has been held valid without collusion in a contested patent case, the validity of the patent will be considered settled for the purposes of the motion.

Coburn et al. v. Clark, 100

2. Where, however, the decision does not show what claims were held valid, nor what would be an infringement, the following questions are left open, viz.: (1) What are the contrivances covered by the patent? (2) Has the defendant infringed the same? *Id.*

3. PROVISIONAL INJUNCTION — BOND. — In a suit brought by a patentee, alleging an infringement and only claiming a royalty or license for the use of the patented device, a motion for a provisional injunction *simpliciter* will not be granted of course, even where the patent alleged to have been infringed has been held valid in cases against other infringers; the defendant will be held only to give bond to the plaintiff to secure him to the full extent of his demand, with costs, etc. *McMillan et al. v. Conrad*, 140

4. TEST CASE — ABANDONMENT OF APPEAL. — Where a patentee brought different suits against A., B., and C., for an alleged infringement of his patent, and the suit against A. was made a test case and went to final hearing, and the patent was held valid and A. held to be an infringer, and A. appealed, but abandoned this appeal at the patentee's instance for a consideration, and the cases against B. and C. were dismissed, and C. continued to use the patented device, *held*, in a suit subsequently brought against C. for infringing the same patent, that he was not bound by the decision in the case against A. *Id.*

5. EFFECT OF DECISION AS TO VALIDITY — PRELIMINARY INJUNCTION.

Where a motion is made for a preliminary injunction for an alleged infringement of a patent which has been held valid, without collusion, in a contested patent case, the validity of the patent is considered settled for the purposes of the motion.

Coburn et al. v. Brainard et al., 215

6. Where, however, the decision does not show what claims were held valid, nor what would be an infringement, two questions are left open, viz.: (1) What are the contrivances covered by the patent? and (2) has the defendant infringed the same? *Id.*

7. REISSUE MUST NOT BE BROADER THAN THE ORIGINAL. — The reissue of a combination patent must be confined to the original combination, and cannot be expanded to make a new combination by the introduction therein of devices not included in or suggested by the original. *Washburn & Moen Manuf'g Co. et al. v. Fuchs et al.*, 236

PATENT — continued.

8. BARBED-WIRE FENCE — KELLY REISSUE — INFRINGEMENT. — The original Kelly patent on barbed-wire fences, numbered 74,379, and issued February 11, 1868, was for a combination by which a plate of iron or steel was strung on a wire and fastened by a blow or compression so as to flatten the opening and fasten it to the wire. The patent contained the following clause, viz.: "I can, where it is desirable to increase the strength of the wire, lay another wire of the same or different size along-side of a thorn wire, and can twist the two by any suitable mechanism. Figure 2 is referred to. It tends to insure a regularity in the distribution of the points in many different directions." The reissue of the same patent, No. 6,903, granted February 8, 1876, suggests in its specifications that the twisted wire will lock the thorns and insure a regularity in the distribution thereof. Prior to the Kelly reissue other constructions of barbs, and their connection with a second and twisting wire to lock barbs of different construction, had been patented or applied for. *Held*, in a suit to recover against alleged infringers who manufactured a fence in which the barb is of wire coiled around one of the strands of the fencing, and locked in position by a second wire twisting around the first: (1) That the wire fence manufactured by defendants neither infringed the original nor the reissued Kelly patent; (2) that the Kelly reissued patent was void because for a combination not included in or suggested by the original, and because if there had been inadvertence, etc., on his part, he had forfeited his right to have his mistake corrected by his laches. *Id.*
9. SAME — GLIDDON REISSUE. — The original Gliddon patent, No. 150,683, on wire fences, was for a combination of two wires not twisted, but looped by spurs at intervals, connected with a slotted tube and springs to regulate expansion. In the reissue No. 6,913 the looping of the wires, the use of the spurs with respect thereto, the slotted tube and spring disappear, and the close twisting of two wires, with spurs interjecting at stated intervals, and locked in position by the second or twisting wire, is claimed. *Held*, that the reissue is void because for a new combination. *Id.*
10. DRIVEN WELL — ORIGINAL PATENT NO. 73,425, AND REISSUE NO. 4,372, VOID — DEDICATION TO PUBLIC — PUBLIC USE — ANTICIPATION. — As the evidence in this case shows that in 1861 Nelson W. Green, who was at that time the colonel of a regiment, in order to supply his men with pure water, devised and put in operation a method of driving wells; that he did not at that time contemplate procuring a patent for his invention, but intended simply to benefit his regiment; that his invention was in

PATENT — continued.

open and public use, with his acquiescence and consent, for more than four years before he applied for a patent; and that this method of driving wells was known and resorted to by certain other persons in Milwaukee, Wisconsin, in 1849 and 1850, and in Independence, Iowa, in 1861,— the reissued letters patent No. 4,872, granted to said Green under date of May 9, 1871, and the original patent No. 73,425, dated January 14, 1868, for an "improved method of constructing artesian wells," must be held invalid and void. *Andrews v. Hovey*, 181

11. REISSUE VOID.— When the original invention did not embrace the idea of creating a vacuum in the lining of the well for the purpose of utilizing the pressure of the atmosphere, nor the original patent, expressly or impliedly, cover or describe the application of this principle, the enlargement of the claim in a reissue for the purpose of covering this idea of atmospheric pressure caused by a vacuum in an air-tight tube will render such reissue void. *Id.*
12. REISSUE MAY EMBRACE WHAT.— A reissue can be validly granted only for the same invention which was originally patented. A reissue that goes beyond this, and covers other and different inventions or improvements suggested by the use of the original invention, will be void. *Id.*
13. PRIOR USE — CONSENT OF INVENTOR — ACT OF 1839 — SECTION 4896, R. S.— The two-years' limitation was intended in the act of 1839, as it unquestionably is in section 4896 of the Revised Statutes, to be general, and it applies to all cases in which the invention has been in public use or on sale for more than two years prior to the application, whether with or without the consent or allowance of the inventor. Per LOVE, J., concurring. NELSON, J., dissents. *Id.*
14. RIGHTS OF ASSIGNEE.— Where, through several assignments, an individual becomes the owner of a number of distinct patents, his rights are no greater than those of his assignors, respectively. *Washburn & Moen Manuf'g Co. v. Griesche*, 248
15. SAME.— Where A. and B. each invented and patented a machine for manufacturing wire fencing, the patent in each case being for a combination, and both patents were assigned to C., held, that C.'s rights were not infringed by D., who used a machine unlike either A.'s or B.'s, but containing features of both. *Id.*
16. ROTARY COULTERS FOR PLOWS — PFEIL PATENT, No. 4,533.— At the date of the Pfeil patent and its reissue, the mere change of form or position in a collar and spindle connected with a standard from a plow-beam, the rotary motion of which was limited by a pin through a slot at one or other foot of the collar and spindle, was not a patentable device, whether the pin was

PATENT—continued.

- inserted at the lower end of the spindle with or without a slot, or inserted through the collar and spindle with a slot, or inserted through the spindle above or below the collar with or without lugs, or whether the pin was used to strike the arms of the coulter or not, and the Pfeil patents upon said devices are invalid for want of novelty. *Manny v. Oyler et al.*, 232
17. SAME — SHERMAN PATENT, NO. 67,222 — INFRINGEMENT.— The invention covered by the Sherman patent for an improvement in rolling coulters consists in a combination in which the cutting wheel is hung in a triangular frame separate from the standard, but attached thereto by means of sockets, or a socket through which the standard passes, and which from their form allow the frame to have a lateral play, while the standard is clamped fast to the plow-beam. *Held*, in a suit for an alleged infringement of said patent, that it was not infringed by a device in which the cutting blade is hung in a yoke differing from the Sherman yoke in shape, and the upper end of which is perforated so as to allow the lower end of the standard to fit into it, and also differing from the Sherman patent in being provided on the under side with a peculiar projection against which a pin at the lower end of the spindle strikes and regulates the vibration. *Id.*
18. LICENSE — INJUNCTION — WHEN DISSOLVED — WHEN GRANTED.— In a suit between the licensee of a certain patent-right and the owners thereof, on motion to dissolve preliminary injunction obtained against said owners, it was *held*, (1) that in so far as the injunction restrained defendants from suing to recover the royalty provided in the license, it must be dissolved; (2) that in so far as it restrained defendants from declaring the license forfeited for non-payment of royalty at the rate provided in the license, the injunction should remain in force. *Baker Manuf'g Co. v. Washburn & Moen Co. et al.*, 504
19. EQUITY JURISDICTION.— Wherever, during the life of a patent, damages and an injunction are prayed for, in a suit against an infringer, equity has jurisdiction. *McMillan et al. v. St. Louis & Miss. Valley Transp. Co.*, 561
20. PLEADING.— In a suit for an infringement, it is unnecessary, where proof of the patent is made, to set it out, or any part thereof, except the title in the bill. Averments in general terms as to invention are sufficient. *Id.*
21. ALLEGATION OF INFRINGEMENT.— A statement "that the defendant is now constructing, using and selling steam-power capstans for vessels, in some parts thereof substantially the same in construction and operation as in the said letters patents mentioned, is a sufficient allegation of an infringement. *Id.*
22. EVIDENCE.— Where, in a suit for the infringement of reissued letters patent, the defendant sets up as a defense that the reissued

PATENT—continued.

letters patent are broader than the original, and therefore invalid, and the plaintiff fails to introduce the original letters patent in evidence, the defendant may introduce them. *National Pump Cylinder Co. v. Simmons Hardware Co.*, 592

23. INQUIRY INTO VALIDITY OF REISSUED LETTERS PATENT.—Where the original letters patent are so introduced, the question as to the validity of the reissued letters patent may be passed upon.

Id.

24. REISSUED LETTERS PATENT NO. 7,006 for "IMPROVEMENT IN PUMPS," VALID—PATENT CONSTRUED.—Reissued letters patent No. 7,006, for an "improvement in pumps," are no broader than the original letters patent No. 90,143, issued for the same invention, and are valid. They are for a metallic tube with vitreous coating internally, and with both ends flared so as to admit within it, from above and below, the wooden tubing with which it is designed to be connected.

Id.

25. INFRINGEMENT.—The sale and use of enameled tubes with a single flare held no infringement.

Id.

PATENT FOR LAND. See *Equity*, 4. *Land Grant*.

1. FRAUDULENT REPRESENTATIONS AS TO VALUE—BILL TO SET ASIDE PATENT.—The United States may bring a bill in equity to set aside a patent for land which has been executed by it, upon the ground that the conveyance was obtained by fraud; and where the party obtaining the patent knows that the land is valuable for its lodes of mineral, and suppresses this fact, and falsely represents the very contrary in his application and in his proofs, and thereby defrauds and deceives the land department, and thus obtains a patent, it is a fraud, and a court of equity may set it aside. *United States v. Iron Silver Mining Co. et al.*, 266

2. CONSPIRACY AND FRAUD IN PROCURING.—A bill which charges a conspiracy between defendants and officers of the land department of the government, with a view to perpetrate a fraud upon the government and other persons, held good on demurrer. *Quære*: To what extent must injury to the government be shown as a basis of relief? Is it enough to show that the patent was obtained in violation of law? *United States v. Marshall Silver Mining Co.*, 325

PAYMENT OF DEBTS. See *Railroad*, 9.PERFORMANCE. See *Contract*, 10. *Specific Performance*.PERILS EXCEPTED. See *Common Carrier*, 1, 2, 12.PERSONAL INJURY. See *Master and Servant*. *Negligence*. *Railroad*, 16, 17.

PERSONAL PRIVILEGE. See *Equity*, 11.

PLACE OF BUSINESS—CORPORATION. See *Removal*, 8.

PLACER MINE. See *Mine*.

PLEADING. See *Equity*, 15, 16, 17, 18. *Federal Courts*, 5. *Negligence*, 10. *Patent*, 20, 21. *Verdict*, 1.

1. LACHES NEED NOT BE PLEADED.—Laches need not be pleaded. If the cause as it appears on the hearing is liable to the objection, the court will refuse relief without inquiring whether there is a demurrer, plea or answer setting it up. *Credit Co. of London v. Ark. Cent. R. Co.*, 23

2. COUNTERCLAIM—FINAL SETTLEMENT.—In a suit to recover alleged balance due on goods consigned under a certain contract, the defendant answered that there had been a full and complete final settlement of all accounts, and set up three counterclaims, as follows: (1) That the defendant had by mistake overpaid a certain sum; (2) that plaintiff had first violated the contract; (3) that the goods were not of the agreed quality. *Held*, that the counterclaims were bad because inconsistent with the defense of final settlement, and that none of them stated facts constituting a cause of action. *Magowan et al. v. St. Louis R'y Supplies Manuf'g Co.*, 253

3. DEFECT IN ALLEGATION SUPPLIED BY EVIDENCE—PARTNERSHIP.—Where, after the dissolution of a firm, one of the partners brought suit in his own name for damages suffered by the firm from a breach of a contract made with it, and the allegations of his petition as to his right to sue in his own name were vague, but it was proved at the trial of the case that the firm had been dissolved by an agreement between the partners, and that the plaintiff, as continuing partner, succeeded by the terms of the agreement to all the rights of the firm, *held*, that the evidence supplied the defect in the petition. *Milne v. Douglass*, 401

PLEDGE.

1. MORTGAGE OF NOTES.—A mortgage of personal property is a sale of the property by way of securing a debt, with a condition that if the mortgagor pays the debt the sale shall be void; a pledge contains no words of sale, but an authority, if the debt is not paid, to sell the pledge for that purpose. In the former case the title passes to the mortgagee; in the latter, the title remains in the pledgor, although possession is given to the pledgee. *Mitchell et al. v. Roberts, Assignee*, 425

2. SAME—TENDER AT COMMON LAW.—At common law a tender of the debt on the law day satisfies the condition of the mortgage, and discharges the property from the incumbrance as effectually

PLEDGE — continued.

ally as payment, but the debt remains and may be recovered by action at law. *Id.*

8. **SAME — TENDER AFTER BREACH OF CONDITION.**— The general rule is that at common law a tender of the debt after breach of the condition does not operate as a discharge of the mortgage. But this rule is not uniform, and in New York, Michigan and New Hampshire a tender of the debt after maturity has the same effect as a tender on the law day, and releases the lien of the mortgage. *Id.*
4. **SAME — TENDER AFTER MATURITY — EFFECT ON LIEN.**— A tender of the debt after its maturity extinguishes the lien on personal property pledged to secure its payment, and the pledgor may recover the pledge or its value in any proper form of action, without keeping the tender good or bringing the money into court; and the pledgee may have his action for the debt. *Id.*
5. **DEBT PAYABLE IN MONEY — EFFECT OF TENDER.**— A debt payable in money is never discharged by a tender. It is only where a debt is payable in specific articles of personal property that a tender operates as a satisfaction of the demand. *Id.*
6. **PLEDGE FOR DEBT OF ANOTHER.**— Where the owner of property pledges it for the debt of another, he is to be treated as standing in the relation of a surety. *Id.*
7. **SAME — TENDER BY PRINCIPAL DEBTOR — DISCHARGE OF SURETY.**— If the principal debtor, after the maturity of the debt, tenders the amount due to the creditor, and he refuses to receive it, the surety is discharged. *Id.*
8. **SAME — WHEN CONSIDERED A SURETY.**— When property of any kind is mortgaged or pledged by the owner to secure the debt of another, such property occupies the position of surety, and whatever will discharge a surety will discharge such property. *Id.*

POSTAL SERVICE. See *Crimes*, 1.

PRACTICE. See *Common Carrier*, 11. *Insurance*, 5.

1. **EXCEPTIONS TO COMMISSIONER'S REPORT.**— Supposed errors in a decree of the court cannot be reviewed on exceptions to the report of a commissioner appointed to ascertain damages. *Sun Mutual Ins. Co. and others v. Mississippi Valley Transp. Co.*, 265
2. **MANDAMUS — SUPERSEDEAS.**— Where a judgment had been recovered against a county upon coupons, and a peremptory writ of *mandamus* had been granted, commanding that proper steps be taken by the county to pay the same, and where the respondent had appealed from the order granting such writ and filed a *supersedeas* bond, and the judgment creditor filed a new infor-

PRACTICE—continued.

- mation entirely ignoring the previous *mandamus* proceedings and asking for an alternative writ of *mandamus*, held, that upon motion for the alternative writ or upon demurrer to the information, the court would not take into view the record of the proceedings in the first *mandamus* case. *United States ex rel. Hill v. Cape Girardeau Co.*, 281
8. CONTINUANCE — ABSENCE OF MATERIAL WITNESS. — Where a defendant, having good reason to believe that his co-defendant, who is a resident of Canada and has not been served, will be present at the trial as he has promised, in reliance on such promise has failed to take his testimony by deposition, and the testimony of the co-defendant is material, a continuance of the case may be granted to allow such testimony to be taken. *Mowatt et al. v. Brown et al.*, 420
4. FORM OF PROCESS — CONSTITUTIONAL PROVISION NOT FOLLOWED BY STATUTE. — The legislature of a state may prescribe the form of process, but in so doing the provisions of the constitution must be observed; and where the constitution provides that every summons shall run in the name of the people, a summons in the form given in the statute, but not in the name of the people, is deficient. *Manville v. Battle Mountain Smelting Co.*, 328
5. SUMMONS RETURNABLE — GARNISHMENT. — A garnishee in Colorado is entitled to ten days in which to appear and answer, "as in other summons in courts of record;" and when the summons is made returnable *within* ten days from the date of service it is a fatal defect. *Id.*
6. SETTING ASIDE JUDGMENT — ABSENCE OF COUNSEL. — The general rule is that parties and counsel will be required to attend to their cases, and be prepared when they are reached on the docket; but cases may occur when, through the absence of counsel, if injustice is done to one party or the other, it can be afterwards corrected; and if a judgment is obtained through the absence of counsel, the judgment may be set aside upon terms. *Anderson v. Scotland*, 414
7. WAIVER OF OBJECTION TO ILLEGAL SERVICE OF PROCESS. — The appearance of a defendant in a case pending in a state court, for the purpose of filing a petition for removal to a federal court, does not constitute such a general appearance as operates a waiver of defective or illegal service of process, so as to prevent his raising any objection to such service after the removal. *Small v. Montgomery*, 440

PRE-EMPTION. See *Equity*, 14. *Trover*, 1.

PREFERENCE. See *Assignment*, 8, 4.

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- PREJUDICE.** See *Removal*, 1.
- PRELIMINARY INJUNCTION.** See *Contempt*, 2. *Equity*, 3. *Injunction*. *Municipal Bonds*, 3. *Presumption*. *Service*, 1.
- PRINCIPAL AND AGENT.** See *Fraudulent Representations*, 3.
- PRIORITY.** See *Federal Courts*, 1. *Mortgage*, 1.
- PRIOR USE.** See *Patent*, 13.
- PRIVILEGE.** See *Equity*, 11.
- PROCEEDING.** See *Admiralty*, 3. *Federal Courts*, 1.
- PROCESS.** See *Officer*, 1, 2. *Practice*, 4, 7.
- PROMISSORY NOTE.** See *Equity*, 3. *Note*.
- PROOF.** See *Bank*, 3. *Contempt*, 2. *Contract*, 7. *Equity*, 2. *Negligence*, 11, 19.
- PROPERTY.** See *Mortgage*, 3.
- PUBLICATION.** See *Service*, 3.
- PUBLIC LANDS.**
1. **SETTLERS ON PUBLIC LANDS — CONSPIRACY TO INTIMIDATE — CRIME UNDER SECTION 5508, R. S.**— During the period that a settler on public lands is required by the laws of the United States to reside upon the land in order to perfect his title thereto, he is in the enjoyment of a right guaranteed to him by those laws, and a conspiracy to deprive him of that right is a conspiracy to deprive him of a right guaranteed by the constitution and laws of the United States, and a crime under section 5508 of the Revised Statutes. *United States v. Waddell et al.*, 155
- PUBLIC USE.** See *Patent*, 10.
- PUNISHMENT.** See *Contempt*, 1.
- PURCHASER.** See *Equity*, 1, 2, 6, 23. *Fraudulent Representations*, 2. *Railroad*, 7, 19.
- RAILROAD.** See *Common Carrier*. *Negligence*.
1. **RECEIVER — CERTIFICATES OF INDEBTEDNESS — REPAIR OF ROAD.** A court of equity may authorize the receiver of a railroad to issue certificates of indebtedness and make them a first lien upon the road, for the purpose of raising funds to make necessary repairs and improvements, but it is a power to be sparingly exercised; and when the road cannot be kept running without its exercise except to a very limited extent, the sound practice is to discharge the receiver or stop running the road and speed the foreclosure. *Credit Co. of London v. Ark. Cent. R. Co.*, 23

RAILROAD — continued.

2. **DUTY TO BUILD ROAD.**— It is not a judicial duty to build railroads, and the assent of all the parties interested in the property cannot make it one, and there is no difference in principle between a court building a railroad by the issue of receivers' certificates, and making extensive and general repairs and betterments, approximating the original cost of construction by like means. *Id.*
3. **RAILWAY MORTGAGE — BENEFICIARIES BOUND.**— In the absence of fraud the beneficiaries in railway mortgages are bound by what is done by their trustee. *Id.*
4. **RAILROAD BONDS — FORECLOSURE.**— Where a holder of railroad bonds alleged the trustee had filed a bill and obtained a decree of foreclosure for the principal of the bonds not due, as well as for the interest which was due, without the written request of the holders of one-third in amount of the bonds, which it was claimed was a necessary prerequisite by the terms of the mortgage to the exercise of the power to declare the principal debt due, and sought for this reason to avoid the foreclosure proceedings, *held*, (1) that it was competent for the trustee to file a bill to foreclose for the interest due; (2) that the plaintiff ratified the action of its trustee by filing and proving in the master's office, in the foreclosure proceedings, more than one-third in amount of all the bonds issued; and (3) that the absence of such a requisition did not affect the jurisdiction of the court, and a decree for a larger sum than was due was error merely, to be corrected on appeal, and that as the error was one of which the trustee could not complain, and there was no fraud, the bondholders were as much bound as the trustee, and could not avoid the decree, on this ground, in any form of proceeding. *Id.*
5. **SAME — EFFECT OF LACHES.**— The effect of laches is not avoided by a general averment that the plaintiff was ignorant of the facts until a short time before the bill was filed. A general allegation of ignorance at one time, and knowledge at another, is of no effect. If the plaintiff made any particular discovery, it should be stated when it was made, what it was, how it was made, and why it was not made sooner. *Id.*
6. **SAME — FORECLOSURE — SALE UNDER.**— When the property of a railroad company is sold under a decree of foreclosure, at which all persons are authorized to bid, the fact that it is purchased by the president of the company in his individual right will not in itself raise a trust relation between him and a holder of the bonds of the company which will entitle the latter to treat him as a trustee of the property so purchased. *Id.*
7. **SAME — PURCHASER AS TRUSTEE.**— One claiming the right to avoid a purchase made by another at a judicial sale, or of treat-

RAILROAD — continued.

ing the purchaser as a trustee, and availing himself of the purchaser's bid, cannot delay the assertion of this right to enable him to decide in the light of subsequent events whether he would or not be profited by its assertion. *Id.*

8. **RECEIVER OF RAILWAY — SALE — ORDER OF CONFIRMATION.** — Where a railway receiver was discharged, and the sale of the property confirmed to a newly-organized corporation, with the provision in the order of confirmation that the new company should pay all the debts of the receiver, and all claims or liabilities pending in the foreclosure case, *held*, that the new company could not be permitted, after accepting the property, to question the validity of the order. *Farmers' Loan & Trust Co. v. Cent. R. of Iowa*, 421

9. **SAME — EQUITY — PAYMENT OF DEBTS OF RAILWAY.** — It is a proper exercise of the chancery power of the court to surrender the trust property to the purchaser, retaining jurisdiction of the original case, and retaining the authority to enforce the payment of the debts and liabilities incurred by the court's receiver in the operation of the railway. *Id.*

10. **FORMER DECREE IN THIS CASE HELD VIOLATED BY REFUSAL TO CHECK BAGGAGE BEYOND DEFENDANT'S LINE — ADVICE OF COUNSEL.** — The action of the Atchison, Topeka & Santa Fe R. R. Co., in refusing to check baggage beyond its own line, *held* to be a violation of the decree entered in this case and reported in 4 McCrary, 835, ordering it not to discriminate against the plaintiff. Inasmuch, however, as said refusal was under the advice of counsel, no penalty should be imposed therefor. *Denver & N. O. R. Co. v. A., T. & S. F. R. Co.*, 287

11. **FORMER DECREE CONSTRUED — COMPETITION TO BE FAVORED.** — The decree above named does not, either by its terms or by necessary implication, forbid a change in the division of freights and fares between the Atchison, Topeka & Santa Fe R. R. Co. and the Denver & Rio Grande R. R. Co., so as to decrease the share of the latter. Courts ought not to interfere for the purpose of preventing any reduction in rates which results from competition between rival lines merely. *Id.*

12. **USE OF STREET FOR TRACKS — GRANT TO CITY OF DUBUQUE — ACTS OF CONGRESS OF JULY 2, 1836, AND MARCH 3, 1837 — STATUTE OF LIMITATIONS — ESTOPPEL — JUDGMENT AGAINST CITY.** — Where a city was laid out under certain acts of congress, the United States causing a certain strip of land fronting upon the river to be reserved and dedicated to public use forever "for the purpose of a highway and further public uses," and where the United States subsequently granted this strip of land to the city, providing, however, that said grant should "in no

RAILROAD — continued.

manner affect the rights of third persons therein, or to the use thereof, but should be subject to the same," *held*, (1) that the title to the ground was in the city as trustee for the furtherance of the public uses and purposes to which the property had been originally dedicated, and title to same could not be obtained by adverse possession; (2) that the action of the city in collecting taxes from plaintiffs, who were claiming to own said ground, could not work an estoppel as against the general public; (3) that as the railroad company, defendant herein, did not acquire from the city its sole right to use the street for its tracks, but from the United States, by virtue of said dedication to public use, said road was not bound by the decree and judgment against the city in the case of *Simplot v. City of Dubuque*, to which it was not a party. *Simplot v. Chicago, M. & St. P. Ry Co.*, 168

18. NEGLIGENCE.— Negligence is the failure to use ordinary care,— that is to say, such care as a person of common prudence would exercise under the circumstances; and where the complaint is that the plaintiff has been injured by the negligence of a railroad company, the question for the jury is, did the railroad company fail to discharge any duty it owed to the plaintiff? *Miller v. Union Pacific Ry Co.*, 800
14. NEGLIGENCE — PUSH CARS.— Where push cars are furnished by a railroad company to be used in transporting materials, and to be propelled by pushing, it is not negligence in the company to fail to supply them with brakes or other means of controlling their movement. *Id.*
15. RAILROAD COMPANY — USAGE OR CUSTOM — USE OF PUSH CARS TO CARRY EMPLOYEES.— Although push cars are originally furnished to be used only to carry materials, yet if the company permits their use to transport workmen from place to place for such a time and so generally as to become a custom of the road, it may be held to have authorized such use. *Id.*
16. WHO IS A PASSENGER.— A person properly on a car in which a railroad company permits people to travel, with the knowledge of said company or any of its agents, is a passenger, and as such the railroad company is bound to use a high degree of care to transport him safely, whether he had a ticket or not. *Secord v. P. M. & M. Ry Co.*, 516
17. SAME — NEGLIGENCE OF ATTENDING SURGEON — RESPONSIBILITY OF RAILWAY COMPANY.— A railroad company having assumed to furnish a surgeon for passengers injured thereby, its duty to the plaintiff is discharged when it provides a surgeon possessing only ordinary skill; and for any damage caused the plaintiff by the negligence of such surgeon, the surgeon, and not the defendant, would be responsible. *Id.*

RAILROAD — continued.

18. **EJECTION OF PASSENGER FROM TRAIN.**— A person on a train refusing to produce a ticket or pay his fare, subsequently changing his mind, and tendering full fare, would be entitled to continue his journey on the train. But if the refusal be accompanied by violent and abusive conduct, whereby the conductor is compelled to stop the train for the purpose of putting him off, he may forfeit such right to remain on the train, and the conductor, using proper discretion, may eject such person, notwithstanding tender of full fare is then made. *Gould v. C., M. & St. P. R. Co.*, 508
19. **STATE BONDS ISSUED IN AID OF RAILROADS — ACTION BY BONA FIDE PURCHASERS — LIABILITY OF RAILROAD COMPANIES — STATUTORY LIEN.**— In pursuance of an act of the general assembly of the state of Arkansas, approved July 21, 1868, entitled "An act to aid in the construction of railroads," the state of Arkansas issued certain bonds to the defendant railroad companies, the bonds were signed by the governor and countersigned by the treasurer of the state, and duly delivered to the companies, and by them sold for value. On the failure of the state to pay the semi-annual interest, this action was brought against the railroad companies to enforce the payment of the same and interest. *Held*, following *Railroad Cos. v. Schutte*, 108 U. S. 118, and *Chamberlain v. St. Paul, etc. R. Co.* 93 U. S. 299, (1) that there was nothing in the bonds themselves, without indorsement, to bind the companies that received and sold them, to pay either the principal or interest; (2) that conceding the bonds to be invalid on account of the unconstitutionality of the statute under which they were issued, as claimed by the defendants, the holders of them were nevertheless entitled to such remedy as the statute gave against the railroad companies who had accepted and sold the bonds, and had thereby ratified the remedies provided by the statute; (3) that there was nothing contained in said act which would constitute a statutory lien for the benefit of the plaintiffs, into whose hands the bonds had come, as against the property of the railroad companies. *Tompkins v. L. R. & Ft. Scott R'y Co. et al.*, 597
20. **SAME — TAXES NOT LIENS.**— It is well settled that a tax is not a lien unless it is expressly made so by the law or ordinance which imposes it. *Heine v. Levee Com'rs*, 19 Wall. 659. *Id.*
21. **RAILROADS — LOCATION UNDER ACT OF CONGRESS IN MOUNTAIN GORGES.**— The location of railroads in mountain gorges, on the public domain, is subject to the second section of the act of congress, approved March 3, 1875, relating to the use of canons, passes and defiles by railroad companies, which provides that no company which locates its line through such place shall

RAILROAD—continued.

prevent any other company from the use and occupancy of the same canon, pass or defile for the purpose of its road, in common with the road first located, or the crossing of other railroads at grade. *Denver & R. G. Ry Co. v. Denver, S. P. & P. R. Co.*, 443

22. **SAME—CONSTRUCTION OF ACT.**—This act bears upon its face the meaning that where there is a canon, pass or defile so narrow as not to admit of the passage of two roads conveniently, it may be used by two or more railroads; but only in cases of necessity can one company go upon the right of way of another for the purpose of building its road. *Id.*

23. **SAME—CROSS-BILL.**—The company having prior right of way may enjoin intrusion thereon by another company, until facts are shown making it necessary for the second company to come on the right of way. Suit for injunction being brought, such necessity may be shown, and the right to enter upon and use such right of way may be enforced on cross-bill. The rights of the parties will be settled upon evidence by final decree, and not in a preliminary way upon motion. *Id.*

24. **INTERSTATE COMMERCE—POWER TO REGULATE, WHERE VESTED—RAILROAD TARIFFS—HOW FAR GOVERNED BY STATE ACTS—TERMS DEFINED, ETC.**—Article 1, § 8, of the constitution of the United States confers upon congress the power “to regulate commerce with foreign nations and among the several states.” This power of congress is exclusive. It follows that the act of the general assembly of Iowa, approved March 23, 1874, providing for a tariff of maximum charges for the transportation of freight and passengers by railroads, in so far as it relates to through shipments over interstate lines, is unconstitutional. *Kaiser v. Ill. Cent. R. Co.*, 496

25. **SAME—TERMS DEFINED AND PRINCIPLES STATED.**—The court, in its opinion, laid down the following propositions as settled: (1) The transportation of merchandise from place to place by railroad is commerce. (2) The transportation of merchandise from a place in one state to a place in another is “commerce among the states.” (3) To fix or limit the charges for such transportation is to regulate commerce. (4) A statute fixing or limiting such charges for transportation from places in one state to places in other states is a regulation of commerce among the states. (5) The power to regulate such commerce is vested by the constitution in congress. (6) This power of congress is exclusive, at least in all cases where the subjects over which the power is exercised are in their nature national, or admit of one uniform system or plan of regulation. *Id.*

REAL ESTATE. See *Equity*, 22.

RECEIVER. See *Mortgage*, 4. *Railroad*, 1, 8. *Removal*, 7.

1. **RECEIVER — DISCHARGE BY COURT OF ITS OWN MOTION.**— A court of equity will not conduct the business of a corporation through a receiver unless the interest of creditors unmistakably requires it; and when a railroad company, by collusion with a creditor who prays for the appointment of a receiver, allows its property to go into a receiver's hands, not for the purpose of meeting its obligation to the petitioning creditor, but for the purpose of keeping its property from other creditors, the court which appointed the receiver will, upon information of the facts, discharge him of its own motion. *Sage v. Memphis & L. R. R. Co.*, 643

RECITALS. See *Municipal Bonds*, 1.

RECKLESS STATEMENT. See *Fraudulent Representations*, 1, 2, 3, 4.

RECORD. See *Equity*, 23.

REDEMPTION. See *Corporation*, 8. *Service*, 5.

REISSUE. See *Patent*, 7, 8, 9, 10, 11, 12, 23, 24.

REMAND. See *Removal*, 4.

REMEDY. See *County Warrants*, 3. *Equity*, 13. *Federal Courts*, 6. *Insurance*, 6. *Lease*, 2.

REMOVAL OF CAUSE.

1. **PREJUDICE AND LOCAL INFLUENCE ACT.**— Under the prejudice and local influence act a party, to have the right of removal, must be a non-resident when the petition for removal is filed. So, where a party, having a right to remove a suit into the federal court from a state court, fails to exercise that right, and subsequently removes into and becomes a citizen of the state where suit is brought, the right of removal is defeated and terminated by the change of citizenship. *Goodnow v. Grayson*, 16
2. **ADMINISTRATOR SUBSTITUTED AS PARTY.**— Where a non-resident, having a right to the removal of suit into the federal court, fails to exercise that right, and removes into the state where suit is brought and becomes a citizen thereof and there dies, his executor or administrator substituted for him in the suit cannot remove it into the state court. *Id.*
3. **CITIZENSHIP.**— Where there is reason to doubt the existence of jurisdictional facts, the parties may be examined upon the question, and the court may direct the proper pleadings to be filed to raise the issues involved in such question. *Gribble v. Pioneer Press*, 73

REMOVAL OF CAUSE — continued.

4. **REMAND.**— Where both plaintiff and defendant are citizens of the state where suit is brought this court has no jurisdiction, and the cause will be remanded. *Id.*
5. **JURISDICTION OF CIRCUIT COURT, WHEN ATTACHES.**— Upon filing the required petition and bond in a state court, in a cause removable under the act of congress, the jurisdiction of the state court ceases, and that of the circuit court immediately attaches. The entering of a copy of the record in the circuit court is necessary to enable the court to proceed, but its jurisdiction attaches when the requisite petition and bond are filed in the state court. *Texas & St. L. Ry Co. v. Rust et al.*, 848
6. **FILING OF RECORD — TIME.**— The act of congress requires the party removing the cause to file a copy of the record on the first day of the next session of the circuit court occurring after the removal. But it may be filed by either party before that time; and when filed and upon due notice, the circuit court will make such interlocutory orders in the case as may be necessary to preserve the property or protect the rights of the parties. *Id.*
7. **MOTION MADE IN STATE COURT — RECEIVER — INJUNCTION.**— Where an injunction is granted and a receiver appointed by the state court without notice to the defendants, and no motion to dissolve the injunction and discharge the receiver is made and acted upon in the state court before the removal of the cause, such motion may be made and heard in the circuit court, upon due notice to the plaintiff, at any time after the record in the case is filed in that court. *Id.*
8. **REMOVAL OF CAUSE — CORPORATION — PLACE OF BUSINESS.**— A corporation is, for jurisdictional purposes, to be regarded as a citizen of the state by whose laws it is created, even though it has no place of business and no office or officer in such state, and has a place of business and officers in another state. *The Pacific R. Co. v. Mo. Pac. Ry Co.*, 878
9. **SAME — SAME — CITIZENSHIP OF CORPORATION CREATED BY THE LAWS OF SEVERAL STATES.**— A corporation created by the consolidation of six constituent corporations, three of which were Missouri corporations and three Kansas corporations, cannot, when sued in a state court in Kansas by a citizen of Missouri, remove the cause to the federal court. Such a corporation is presumed to be composed of persons who are citizens of both said states. *Id.*

REPRESENTATIONS. See *Fraudulent Representations. Patent for Land*, 1.

REPUDIATION. See *Fraudulent Representations*, 4.

RES ADJUDICATA.

1. **RES ADJUDICATA — WHAT ORDERS ARE.**—There is a distinction to be noted between orders made upon motions respecting collateral questions arising in the course of a trial and final orders affecting substantial rights, and from which an appeal lies: the latter are *res adjudicata*, and binding upon the parties, unless reversed or modified by an appellate tribunal. *Spitley v. Frost et al.*, 48

RESCISSION. See *Contract*, 1.

RESIDENCE. See *Jurisdiction*, 5.

RESPONSIBILITY. See *Master and Servant*, 4. *Negligence*, 15, 16. *Officer*, 1, 2. *Railroad*, 17.

RESTRICTION — LIABILITY. See *Telegraph*, 3.

RETROSPECTIVE LAWS. See *Equity*, 10.

RETURN OF SUMMONS. See *Practice*, 5.

REVENUE.

1. **REVENUE LAW — ASCERTAINMENT OF INFORMER'S FEES AFTER CASE IS DISPOSED OF — ACT JUNE 22, 1874 — JURISDICTION.**—Where, after a final decree has been made in a smuggling case, and executed by paying a fine imposed into the United States treasury, a petition was filed in the court which had made the decree, by a party claiming to be the original informer in said case, praying for a certificate from the court as to the value of his services, for the information of the secretary of the treasury, *held*, that the court had no jurisdiction. *Ex parte Ganz*, 393

RISKS. See *Negligence*, 12, 18.

RULE. See *Guaranty*, 2, 3, 4. *Indictment*, 2.

SALE. See *Contract*, 9, 10. *Corporation*, 8. *Damages*, 1. *Factor*, 1, 2, 3, 4. *Jurisdiction*, 4. *Railroad*, 6, 8. *Service*, 5.

SCHEDULE. See *Assignment*, 1.

SCOPE OF EMPLOYMENT. See *Negligence*, 17.

SERVANT. See *Master and Servant*. *Negligence*, 16.

SERVICE. See *Practice*, 7.

1. **PRESUMPTION — ENTRY OF JUDGMENT OR DECREE.**—The entry of a judgment or decree by a court, of necessity presupposes the fact that the court has found that due service has been had or an appearance has been entered. *Hartley v. Boynton et al.*, 453
2. **RECTAL IN DECREE.**—This presumption, however, does not prevent a party from showing, in a proper proceeding, that in fact he had not been properly served, and therefore is not bound by a given judgment or decree; and this right is not barred by

SERVICE — continued.

a recital in the decree that the court has examined the service and finds it to be according to law. *Id.*

3. **PUBLICATION.**—Service of notice by publication is a purely statutory right, and is of such a nature that all of the provisions of the statute must be strictly complied with, and courts will not indulge in presumptions to supply apparent defects or failures to meet the requirements of the statute. *Id.*
4. **IOWA CODE, § 2618, SUBD. 6—AFFIRMATIVE SHOWING OF NON-RESIDENCE.**—To justify the publication of the notice under subdivision 6 of section 2618 of the Iowa code of 1873, it must appear that the action was of the character described in such subdivision, and that the defendants were non-residents of Iowa, and an affidavit must be filed showing that personal service could not be made on defendants within the state of Iowa; and where it is not shown by the record in a cause in the circuit court of the county from which the case has been removed to the circuit court of the United States, nor by the evidence *aliunde*, nor by the evidence in the case on trial in the United States court, that the defendant was a non-resident of Iowa when service was attempted to be made on him by publication, the decree entered in the case by the state court will be *held* void for want of jurisdiction. *Id.*
5. **TAX SALE—REDEMPTION—NOTICE TO “UNKNOWN OWNERS”**—**IOWA CODE, § 894.**—As, under the facts in evidence in this case, it does not appear that on the first of October, 1877, the lands in controversy had been taxed for that year, for the reason that the several steps necessary to be completed to perfect the taxation for that year are not shown to have been completed, and the records of the county for the previous year show that such lands were taxed in the name of complainant, he was entitled to be notified, as required by section 894 of the Iowa code, that the right of redemption would expire and a deed be demanded in ninety days after completed service of the notice; and a notice by publication to “the unknown owners” of such lands was not sufficient, and the tax deeds executed by the county treasurer after such notice are null and void. *Id.*
6. **CURATIVE ACT OF MARCH 18, 1874—IOWA CODE, § 8049—REVISION, § 8275.**—The Iowa statute of March 18, 1874, was intended to legalize the levy of the special taxes therein specified, the right to levy which had been claimed under section 8275 of the Revision, and the amendment thereto; and the adoption of section 8049 of the code of 1873 must be deemed to be an amendment to section 8275 of the Revision, within the meaning of the statute, and judgment taxes levied prior to the date of the curative act are legalized thereby. *Id.*

SETTLEMENT. See *Negligence*, 14. *Pleading*, 2.

SETTLERS. See *Public Lands*. *Trover*, 1.

SOLVENCY. See *Guaranty*, 4.

SPECIFIC PERFORMANCE. See *Contract*, 10.

1. WHEN DECREED.— Before a court can decree a specific performance of a contract, the party seeking the relief must establish his right thereto by satisfactory evidence, and this can only be done on the final hearing of the cause. *Texas & St. L. Ry Co. v. Rust et al.*, 848
2. CASE STATED.— The plaintiff railway company entered into a contract with the defendants for the construction by the latter for the former, of a railroad bridge across the Arkansas river. Differences arose between the parties as to their respective rights under the contract, which resulted in stopping work on the bridge. The plaintiff thereupon filed a bill, asking the court to take possession of the defendants' plant and complete the bridge, with funds to be furnished by the plaintiff; leaving all questions of difference between the parties for future settlement or adjudication. *Held*, that the court had no power to seize and use the defendants' plant, and that it would not undertake the work of completing the bridge. *Id.*

STATE—ADMISSION. See *Northwestern Territory*.

STATE COURT. See *Federal Courts*, 2, 3.

STATE OFFICERS. See *Municipal Bonds*, 2.

STATE STATUTES. See *Federal Courts*, 8, 10. *Navigable Streams*.

STATUTE OF LIMITATIONS. See *Corporation*, 2. *Deed*, 2. *Federal Courts*, 10. *Laches*, 1, 4. *Railroad*, 12.

1. Statutes of limitations are statutes of repose, and are enacted upon the presumption that one having a well-founded claim will not delay enforcing it beyond a reasonable time if he has the power to sue. Such reasonable time is, therefore, defined and allowed. But the basis of the presumption is gone whenever the ability to resort to the court has been taken away, and in such a case the creditor has not the time within which to bring his suit that the statute contemplated he should have. *Greenwald v. Appell*, 339
2. BANKRUPTCY—DELAY IN APPLYING FOR DISCHARGE.— Proceedings in bankruptcy amount to an injunction against any proceedings against the bankrupt to enforce his contracts in the courts, but if he delays for an unreasonable time to apply for his discharge, the right of action against him upon his

STATUTE OF LIMITATIONS — continued.

contracts or debts, which was suspended by the commencement of proceedings in bankruptcy, revives, and during the time that the right of action was suspended by the bankruptcy proceedings the statute of limitations will not run in his favor. *Id.*

STATUTES. See *Assignment*, 3. *Damage*, 1. *Practice*, 4.

FEDERAL:

Act of July 2, 1836. See *Railroad*, 12.
 Act of March 3, 1837. See *Railroad*, 12.
 Act of March 3, 1839. See *Patent*, 18.
 Act of June 22, 1874. See *Revenue*, 1.
 Act of March 3, 1875. See *Jurisdiction*, 1, 2. *Railroad*, 21, 22.
 Rev. Stat., sec. 735. See *Contempt*, 1.
 Rev. Stat., sec. 915. See *Federal Courts*, 1.
 Rev. Stat., sec. 2333. See *Mining*.
 Rev. Stat., sec. 8691. See *Crimes*, 1.
 Rev. Stat., sec. 4886. See *Patent*, 18.
 Rev. Stat., sec. 5490. See *Indictment*, 5.
 Rev. Stat., sec. 5508. See *Public Lands*.

STATE:

Arkansas, Act of July 21, 1868. See *Railroad*, 19.
 Colorado. See *Assignment*, 3.
 Iowa. See *Negligence*, 20. Act of March 18, 1874, see *Service*, 6. Act of March 23, 1874, see *Railroad*, 24. Code, sec. 894, see *Service*, 5. Code, sec. 2618, see *Service*, 4. Code, secs. 3049, 3275, see *Service*, 6.
 Minnesota, Act of February 24, 1872. See *Booimage*, 1.
 Missouri, Rev. Stat. 1879, sec. 3280, see *Laches*, 4. Secs. 5785, 5786, see *Innkeepers*, 1, 2.

STATUTORY OFFENSE. See *Indictment*, 1.

ST. LOUIS BOOM AND IMP. CO. See *Booimage*, 1.

STOCKHOLDER. See *Corporation*, 1, 4, 5, 6. *Insurance*, 4.

STREAMS. See *Navigable Streams*.

STREETS. See *Railroad*, 12.

SUBROGATION. See *Guaranty*, 5.

SUBSEQUENT PURCHASER. See *Equity*, 6.

SUMMONS. See *Practice*, 5.

SUPERIOR OFFICER. See *Negligence*, 23.

SUPERSEDEAS. See *Practice*, 2.

SURETY. See *Pledge*, 6, 7, 8.

TARIFF. See *Railroad*, 24, 25.

TAXES. See *Railroad*, 20.

TAX SALE. See *Service*, 5.

TELEGRAPH.

1. **TELEGRAPH MESSAGES — NEGLIGENT TRANSMISSION — LIABILITY.**

In an action for damages for negligence in the transmission of a message by a telegraph company, whereby the sender of the message suffered pecuniary loss, the burden of proof rests upon the plaintiff to show that the error or mistake occurred through the culpable carelessness and gross negligence of the operators or employees of the company; a simple mistake in transmitting a dispatch is not sufficient to render the company liable. *White, Washer & King v. Western Un. Tel. Co.*, 104

2. **SAME — NATURAL CAUSES.**— Where the errors or mistakes in the transmission of the dispatch occurred through climatic influences, such as storms, lightning, rain, or other natural causes, temporarily affecting the insulation of the wires, or the working of the instruments, the company is not responsible; as the mere fact that a mistake was made in the message transmitted would not itself authorize any recovery for more than nominal damages. *Id.*

3. **SAME — CONTRACT RESTRICTING LIABILITY.**— A contract written at the head of a telegraph dispatch, restricting the liability of the company for loss from mistake or negligence in the transmission or delivery of the dispatch, will not exonerate the company from loss or damage caused by the wanton carelessness or gross negligence of its servants, agents or operators. *Id.*

4. **SAME — NEGLIGENCE.**— The highest degree of care is not required of telegraph companies in the transmission of messages over its lines; if ordinary care is exercised by its agents, employees or operators, it is sufficient to exonerate them from liability for loss or damage. *Id.*

5. **SAME — GROSS NEGLIGENCE.**— Gross negligence is that want of care which a person habitually careless and negligent would exercise in business transactions. *Id.*

TENDER. See *Pledge*, 2, 3, 4, 7.

TERRITORY. See *Northwestern Territory*.

THEFT. See *Innkeeper*, 1, 2, 3.

TIMBER. See *Trover*, 1.

TITLE. See *Ejectment*, 1. *Equity*, 14, 18. *Pledge*.

TOWAGE. See *Admiralty*, 6. *Common Carrier*, 2.

TRADE. See *Negligence*, 13.

TRIAL. See *New Trial*, 1, 2.

TROVER.

1. ACTION OF TROVER — RIGHT OF SETTLERS TO CUT TIMBER AND IMPROVE LAND BEFORE PRE-EMPTION.— A settler, claiming in good faith a homestead, can, for the purpose of improving the land, cut down the necessary timber before he files his entry in the land office. There is nothing in the homestead act requiring an entry in the land office before settlement. *United States v. Yoder*, 615

TRUST. See *Railroad*, 7.

TRUSTEE. See *Railroad*, 7.

UNITED STATES COURTS. See *Federal Courts*.

UNKNOWN OWNERS. See *Service*, 5.

USAGE. See *Railroad*, 15.

VALIDITY. See *Contract*, 5, 8. *Patent*, 1, 2, 5, 24, 25.

VALUE. See *Equity*, 3. *Patent for Land*, 1.

VENDOR. See *Fraudulent Representations*, 4.

VERDICT.

1. SUSTAINED BY ONE GOOD COUNT.— Where the verdict in a criminal case is general, if any one count in the indictment is good, the judgment cannot be arrested. *United States v. Jensen*, 84

VESSEL. See *Admiralty*.

VICE-PRINCIPAL. See *Master and Servant*, 4, 5.

VIOLATION — DECREE. See *Railroad*, 10.

WAIVER. See *Practice*, 7.

WARRANTS. See *County Warrants*.

WARRANTY. See *Deed*, 1, 2.

WIDOW'S PORTION. See *Estates*, 1, 2.

WIFE. See *Equity*, 8.

WITNESS. See *Practice*, 3.

WOMEN. See *Equity*, 7, 8.

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